

"CR"

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

THURSDAY, THE 1ST DAY OF OCTOBER 2015/9TH ASWINA, 1937

CRL.A.No. 607 of 2004 (A)  
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AGAINST THE JUDGMENT IN SC 321/2001 of ADDL.DISTRICT COURT (ADHOC-I),  
KASARAGOD DATED 29-03-2004

APPELLANT/ACCUSED::  
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HARIJAN PALA, AGED 42,  
S/O. KAIKKALAN, PALLIKOCHI, NELLIYARA,  
PARAPPA VILLAGE.

BY ADVS.SRI.T.K.VIPINDAS  
SMT.M.CHANDRALEKHA, LEGAL AID COUNSEL

RESPONDENT/COMPLAINANT::  
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STATE OF KERALA,  
REPRESENTED BY THE PUBLIC PROSECUTOR  
HIGH COURT OF KERALA, ERNAKULAM, REPRESENTING  
THE S.H.O., VELLARIKUNDU POLICE STATION.

BY P.P.SRI. JIBU P. THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 01-10-2015,  
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**“CR”**

**K. RAMAKRISHNAN, J.**

.....  
Crl.A.No.607 of 2004

.....  
Dated this the 1<sup>st</sup> day of October, 2015.

**JUDGMENT**

The accused in S.C.No.321/2001 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, Vellarikundu Police Station in crime No.68/2000 of that police station under section 55(g) of the Abkari Act.

2. The case of the prosecution in nutshell was that on 29.4.2000 at about 18.15 p.m the accused was found to be in possession of 50 litres of wash in two aluminium vessels in the court yard of his unnumbered house situated in Pallikochi of Paramba village in violation of the provisions of the Abkari Act and thereby he had committed the offence punishable under section 55(g) of the Abkari Act.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court-II, Hosdurg, where it was taken on file as C.P.No.130/2000. After complying the formalities, learned Magistrate committed the case to Sessions Court, Kasaragod where it was taken on file as S.C.No.321/2001 after

committal. The case was made over to the Assistant Sessions Court, Hosdurg for disposal by the Sessions Judge. Later it was withdrawn and made over to Additional Sessions Court, Adhoc-I, Kasaragod for disposal.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 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 4 were examined and Exts.P1 to P6 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 referred to as the '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 evidence in the case did not warrant an acquittal under section 232 of the Code, 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(g) of the Abkari Act and convicted him thereunder and sentenced him to

undergo rigorous imprisonment for two years and also to pay a fine of Rs. One lakh, in default to undergo rigorous imprisonment for six months more. Set off was allowed or the period of detention already undergone 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 Sri.T.K. Vipindas, counsel appearing for the appellant and Sri. Jibu P. Thomas, Public Prosecutor appearing for the State.

6. Counsel for the appellant submitted that there is no acceptable evidence adduced on the side of the prosecution to prove that the accused was in possession of the house or the property from where the alleged contraband articles were seized. The evidence of the village officer is not sufficient to prove his possession. Further though seizure was on 29.4.2000, articles were produced before court on 2.5.2000 and there is no explanation forthcoming for the delay. Further the property list was not marked. There is discrepancy in the property list regarding the quantity of sample taken as mentioned therein when compared to the First Information Report and seizure mahazer. In seizure mahazer, the quantity mentioned is 500 ml whereas in the property list it

was corrected as 600 ml and it was shown as 600 ml in the forwarding note as well. So it cannot be said that article reached the court without tampering and under such circumstances it cannot be said that the chemical analysis report relates to the same article alleged to have been seized from the possession of the accused and that benefit must be given to the accused. He had relied on the decision reported in ***Ravi v. State of Kerala & another***(2011 (3) KHC 121) in support of his case.

7. On the other hand, Public Prosecutor argued that PW4 Detecting Officer had explained that he was in possession of the article till it was produced in court and he had also clarified in the reexamination that correction was made by him and it was initialled as well. Further he had only given approximate quantity of the sample and only in the property list it was correctly mentioned. So 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 29.4.2000 at about 6.15 p.m while PW4 was doing patrol duty and when he reached the place of occurrence, he

saw the accused sitting in front of his house in the court yard and stirring a vessel and on seeing the police party, he tried to run away from the place. So they stopped him and on examination, he found that there were two aluminum vessels which were identified as Mos 1 and 2 and it contained 30 litres and 20 litres of wash in each cannas. He had taken about 500 ml from each vessel in a 750 ml bottle as sample and thereafter sealed the same and labelled the same containing the signatures of the witnesses and himself. Thereafter he destroyed the wash and affixed label on Mos 1 and 2 aluminum vessels in which the wash was seen and seized the same as per Ext.P1 mahazer. Thereafter he arrested the accused and came to the police station and registered Ext.P4 First Information Report as Crime No.68/2000 of Vellarikundu police station under section 55 (g) of the Abkri Act against the accused. He produced the accused along with the remand report before court on the next day. He prepared property list and forwarding note and produced the contraband article before court with a request to send the sample for analysis. It was sent from court and Ext.P6 report obtained which shows that the sample contained 4.78 and 3.77% by volume of ethyl alcohol respectively and it was having the characteristic

of wash. The investigation in the case was conducted by PW4. He had prepared Ext.P2 scene mahazer in the presence of PW2 and another. He questioned the witnesses and recorded their statements. He completed the investigation and submitted final report.

9. PW1 is the independent witness to the seizure. He had stated that he was present at the time when seizure was effected and he signed Ext.P1 mahazer. But in the cross examination, he had stated that he did not know what was written in Ext.P1 mahazer and he did not know what is the nature of article seized.

10. PW2 is an attester to Ext.P2 scene mahazer. He had also admitted that he signed the mahazer from the house of the accused. PW1 also admitted that he signed Ext.P1 from the house of the accused. Pw4 is the detecting cum investigating officer. He had deposed that he got information that accused was in possession of arrack and so he went to the house and found the accused handling with Mos.1 and 2 aluminum vessels. On seeing the police party, he ran away from the place. Immediately they chased and stopped him and then on examination of Mos 1 and 2, they found that it contained a total quantity of 50 litres of wash. Thereafter he had taken

about 500ml liquid as sample from each vessel in a 750 ml bottle and destroyed remaining wash and affixed label on the bottles and the vessels and sealed the bottles and seized the same as per Ext.P1 mahazer. Though he was cross examined at length, nothing was brought out to discredit his evidence on this aspect. Further the fact that accused was arrested with some articles in front of his house was proved by PW1 also.

11. It is true that PW3 village officer was not able to say on what basis he came to the conclusion that accused was in possession of the property. But the evidence of PW1, neighbour and evidence of PW2, another witness signed seizure mahazer will go to show that the accused was residing in that house at the relevant time. So it can be safely concluded that the prosecution has proved beyond reasonable doubt that some liquid said to be wash contained in Mos 1 and 2 vessels was seized by PW4 on that day from the accused while he was handling the same in front of his house.

12. Mere seizure of article alone is not sufficient to prove that the accused had committed the offence. The link between the accused and the contraband article has to be established by the prosecution and also they will have to establish that the chemical analysis report relates to the representative sample



said to have been taken from the contraband article seized from the possession of the accused. In this case it is seen from Ext.P1 seizure mahazer that about 500 ml was taken as sample. In the First Information Report also it was mentioned that 500ml was taken as sample from the contraband article. But in Ext.P5 forwarding note and Ext.P6 chemical analysis report, the quantity of sample was shown as 600 ml. Further in this case property list was not marked though it was relied on by the court below for proving discrepancy in the quantity of sample mentioned therein with some correction. It was admitted by PW4 that in the property list, the quantity of sample taken was corrected as 600 ml from 500 ml and he had clarified in the reexamination that it was corrected by him and he initialed the same. But he had no explanation as to how the quantity of sample was mentioned as 500 ml in the seizure mahazer which was the first contemporaneous document prepared by the detecting officer when the seizure was effected and the reason for correcting the quantity in the property list and the forwarding note.

13. Further it will be seen from the evidence of PW4 and also observation made by the court below in the judgment that properties were produced before court only on 2.5.2000. There

is no explanation forthcoming from the side of the investigating officer or the detecting officer regarding the delay in producing the article. When the delay is not explained and there is discrepancy in the forwarding note regarding the quantity of sample taken from the one mentioned in Ext.P1 seizure mahazer and the property list and the forwarding note and also the chemical analysis report, then it cannot be said that it was the same article that has been seized from the possession of the accused produced before court in tamper proof condition and it reached the chemical examiner's laboratory in tamper free condition and the chemical analysis report relates to the representative sample said to have been taken from the huge quantity of contraband article alleged to have been seized from the possession of the accused. If this link is not established, then it cannot be said that the prosecution has proved beyond reasonable doubt the commission of the offence by the accused. This was so held in the decision reported in ***Ravi's case*** (cited supra). In this case also, the discrepancy in the quantity of sample was not explained and the delay in production of the article also was not explained and the property list was deliberately not marked though it was relied by the court below as it contained some discrepancy in the quantity of sample said

to have been taken from the contraband article alleged to have been seized from the possession of the accused. These aspects were not properly considered by the court below before coming to the conclusion that prosecution has proved beyond reasonable doubt that the accused had committed the offence punishable under section 55(g) of the Abkari Act and that benefit must be given to the accused. In view of the discussion made above, the conviction entered by the court below on the basis of erroneous appreciation of evidence by the court below 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 accused is entitled to get acquittal, sentence imposed is not proper and the same is 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(g) of the 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 court below 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 a copy of this judgment to the concerned court immediately.

**Sd/-**  
**K. RAMAKRISHNAN, JUDGE.**

/true copy/

P.S to Judge

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