

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 12TH DAY OF OCTOBER 2015/20TH ASWINA, 1937

CRL.A.No. 624 of 2004 ()

AGAINST THE JUDGMENT IN SC 331/2003 of ADDITIONAL SESSIONS JUDGE
(ADHOC-I), ERNAKULAM, DATED 19-03-2004

APPELLANT/ ACCUSED:

RAJAN, S/O.SANKARAN,
ALUVAKKARANVEETIL, NEAR PUSHPAGIRI SCHOOL,
KUNNAPPILLYKARA, MELOOR VILLAGE.

BY ADVS.SRI.JOHN NUMPELI (JUNIOR)
SRI.P.V.PAULSON
SRI.P.K.VARGHESE

RESPONDENT/ COMPLAINANT(S):

STATE OF KERALA, REP. BY PUBLIC
PROSECUTOR, HIGH COURT OF KERALA.

LEGAL AID COUNSEL BY ADV. SMT.T.RADHAMANI
PUBLIC PROSECUTOR SRI. JIBU P.THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 12-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SS

K. RAMAKRISHNAN, J.

.....
Crl. Appeal No.624 of 2004

.....
Dated this the 12th day of October, 2015

J U D G M E N T

Accused in S.C.No.331/2003 on the file of the Additional Sessions Court (Ad-Hoc-I), Ernakulam, is the appellant herein. The appellant was charge-sheeted by the Sub Inspector of police, Ayyampuzha police station under Section 8 and 55(a) of Abkari Act.

2. The case of the prosecution in nut shell was that, on 26.07.2000 at about 6.15 p.m., the accused was found to be in possession of 1^{1/2} liters of arrack and found transitting the same in violation of the Provisions of Abkari Act and thereby he had committed the offence punishable under Section 8(1) and 55(a) of the Kerala Abkari Act.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court-I, Perumbavoor, where it was taken on file as C.P.No.99/2002. After completing the formalities the case was committed to the Sessions Court, Ernakulam, by the learned magistrate

where it was taken on file as S.C.No.331/2003 and the case was made over to Additional Sessions Court (Ad-Hoc-I), Ernakulam, for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under Section 55(a) of Abkari Act (ought to be under Section 8(1) and (2) 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 5 were examined and Exts.P1 to P7 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. He had further stated that, while he was coming after his work, the police officials asked him as where he will get arrack, he said that he did not know and he was taken into custody and he has been falsely implicated in the case and then produced before the court on the next day.

Since the evidence in this case did not warrant an acquittal under Section 232 of the Code of Criminal Procedure, the accused was called upon to enter on his defence. DW1 was examined on his side to prove his case. After considering the evidence on record, the court below found the appellant guilty under Section 55(a) of the Abkari Act and convicted him thereunder and sentenced him to undergo rigorous imprisonment for 2^{1/2} years and also to pay a fine of ₹1,00,000/-, in default to undergo simple imprisonment for one year. 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. Since the counsel who filed the appeal was not available in spite of opportunity given, Smt.T. Radhamani, Adv. Ernakulam was appointed as Legal Aid Counsel. Heard the Legal Aid counsel Smt.Radhamani and Sri.Jibu P. Thomas, Public Prosecutor appearing for the State.

6. The counsel for the appellant submitted that though two independent witnesses were examined to prove the case of the prosecution, PW3 did not support the case of the prosecution. Though PW4 supported the case of the prosecution, he was disbelieved by the court below. So under such circumstances it cannot be said that merely relying on the evidence of official witnesses the court below should not have come to the conclusion that the arrest and seizure were properly proved. Further the nature of seal used was not mentioned in the mahazar or in the property list. The specimen seal impression of the seal was not produced before the court even along with the forwarding note. So under the circumstances, it cannot be said that the article reached the court in tamper free condition and the chemical analysis report relates to the article seized from the possession of the accused. So he is entitled to get acquittal.

7. On the other hand, learned Public Prosecutor submitted that, both PWs 3 and 4 had admitted the

signature and it was also stated by PW3 that he signed the same near Athirappilly Junction from where the accused was arrested. The articles were produced in court in time without delay and as such 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 26.07.2000 at about 06.15 p.m., while PW1 the Sub Inspector of police attached to Ayyampuzha police station was doing patrol duty along with PW2 and when they reached near Athirappilly junction, they saw the accused coming with MO1 kannas towards the junction and on seeing the police party, he tried to go away from that place. So he stopped him and on verification of the kannas it was revealed that it is having 1^{1/2} liters of some liquid. On further examination, he was satisfied that it was arrack. He took sample and sealed the bottle and also sealed the kannas and seized the same as per Ext.P2 mahazar in the presence of PWs 3 and 4. He arrested the accused and

prepared Ext.P3 arrest memo and gave arrest intimation to his relative. Thereafter he came to the police station along with accused and the contraband articles and registered Ext.P1 First Information Report as Crime No.45/2000 under Section 55(a) and 8(1) of the Abkari Act. He prepared Ext.P4 properly list and produced the accused and the contraband articles before court on the next day along with remand report and property list respectively. He questioned the witnesses and recorded their statements. Further investigation in this case was conducted by PW5, his successor Sub Inspector, who sent Ext.P6 forwarding note with request to send sample for analysis. Accordingly the sample was sent from court and Ext.P7 chemical analysis report was obtained which shows that the sample contained 40.41% by volume of ethyl alcohol. He collected the chemical analysis report and produced the same before court. He completed the investigation and submitted final report.

9. The prosecution relies on the evidence of

PWs 1 to 4 to prove the arrest and seizure. PW3 is an independent witness to the seizure, but he did not support the case of the prosecution. He had denied having seen the arrest or seizure of any contraband article from the possession of the accused. He had further stated that he did not know the accused as well. But he admitted his signature in Ext.P2 mahazar and stated that he signed the same from Athirappilly junction. PW4 had admitted the arrest, seizure and signing of Ext.P2 mahazar. According to him he belongs to Angamaly and he came to Athirappilly junction to go to his relatives house and at that time he happened to see the incident. But court below after analyzing his evidence came to the conclusion that his evidence is not believable and his presence at the place of occurrence cannot be believed. So one of the independent witness examined on the side of the prosecution was not believed by the court below.

10. But court below relied on the evidence of PWs 1 and 2, as they are the official witnesses. They have categorically stated that they have arrested the accused

along with MO1 cannas on 26.07.2000 at about 6.15 p.m when they saw him coming with MO1 cannas and tried to go away from the place and also the manner in which the sample was taken, seizure was effected etc. It is true that though they were cross examined at length nothing was brought out to discredit their evidence on this aspect. But when one of the independent witness to the seizure was disbelieved by the court below, then it is not safe to rely on the uncorroborated evidence of official witnesses alone to prove the seizure.

11. It is true that the decisions are to the effect that there is nothing wrong for the court to rely on the official witnesses, if the independent witness of the seizure turned hostile to the prosecution. But position will be different, if one of the independent witness supported the case of the prosecution, but his evidence was not believed by the court. Once the independent witness who supported the case of the prosecution was not believed by the court below, then there is a doubt regarding the genuineness of

the seizure and arrest made though as per the documents they are found to be in order, especially when the accused had a case that he was falsely implicated in the case. So under the circumstances, it is not safe to rely on the evidence of the official witnesses alone for the purpose of coming to the conclusion that prosecution has proved the arrest and seizure as claimed by them.

12. It is true that the evidence of DW1 is not helpful to prove the case of false implication, but it can be relied on for the purpose of proving the fact that, he is a mason and he worked in the hospital in connection with some construction work on that day and left the hospital at 5.15 p.m. But he had admitted that one required only half an hour to reach the Athirappilly junction.

13. Further it is seen from Ext.P2 mahazar that the nature of seal used for sealing the article was not mentioned. Further either in Ext.P2 mahazar or in the property list, the specimen seal used for sealing the article was mentioned or its impression was provided. The

forwarding note was produced by PW5, but even in the forwarding note the specimen seal impression for the seal used for sealing the article was not provided and the forwarding note was not marked. This court has verified the forwarding note available in the record, that shows that, in this space provided for specimen seal impression, there is no specimen seal impression provided. Further it is seen from the covering letter sent from court that the specimen impression for seal used for sealing the material object is also affixed, but unfortunately the copy seen in the record, such a specimen seal is missing. So under the circumstances, though the article was produced before the court on the very next day itself, in the absence of specimen seal provided either in the property list or in the forwarding note, when the nature of seal used was not mentioned in Ext.P2 mahazar, it will create doubt regarding the genuineness of the article produced before the court as well, especially when one of the witnesses examined on the side of the prosecution as a seizure mahazar witness was

disbelieved by the court below. So under the circumstances, it cannot be said that the prosecution has succeeded in proving the fact that the articles reached the court in a tamper free condition and the chemical analysis report relates to the representative sample said to have been taken from the possession of the accused so as to convict him for the offence for the possession of arrack and that benefit must be given to the accused. So the finding of the court below that the prosecution has proved beyond reasonable doubt that the accused was found to be in possession of arrack 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 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 fine amount if any remitted by the appellant is directed to be refunded to him by the court below on making necessary application for that purpose. I place appreciation on record for the manner in which Smt.Radhamani, Legal Aid Counsel appointed has argued the case on behalf of the appellant.

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

Sd/-

K. Ramakrishnan, Judge

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P.A. to Judge

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