

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

WEDNESDAY, THE 30TH DAY OF SEPTEMBER 2015/8TH ASWINA, 1937

CRL.A.No. 631 of 2004 (A)

AGAINST THE JUDGMENT IN SC 197/2001 of ADDL.DISTRICT COURT (ADHOC) -
II, ALAPPUZHA DATED 22-3-2004

APPELLANT(S)/ACCUSED:

VIJAYAN, AGED 65 YEARS,
S/O. NANU CHENKILATH THEKKETHIL VEEDU, GRAMAN MURI,
ENNAKKADU VILLAGE, CHENGANNUR TALUK.

BY ADV. SRI.N.ASHOK KUMAR

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA, REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR, SRI. JIBY P. THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
30-09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

DST

K. RAMAKRISHNAN, J.

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Crl. Appeal No.631 of 2004

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Dated this the 30th day of September, 2015

J U D G M E N T

Accused in S.C. No. 197/2001 on the file of the Additional Sessions Court (Adhoc-II) Alappuzha is the appellant herein. The appellant was charge sheeted by the Excise Inspector, Chengannur in Crime No. 101/1993 of that Excise Range under Section 55(a) and (i) of the Abkari Act (which ought to be under Section 8(1) and (2) of the Abkari Act).

2. The case of the prosecution in nutshell was that on 23.12.1998, at about 5.45 pm, the accused was found to be in possession of two litres of arrack near the house of one 'Sreedharan' for the purpose of sale, in violation of the provisions of the Abkari Act and thereby, he had committed the offence punishable under Section 55(a) and (i) of the Abkari Act. After investigation, final report was filed before the Judicial First Class Magistrate-II, Chengannur where it was taken on file as C.P. No. 54 of 2000. After complying with the formalities, the learned Magistrate committed the case to Sessions Court, Alappuzha

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under Section 209 of the Code of Criminal Procedure (*hereinafter called 'the Code'*). After committal, the Sessions Judge, Alappuzha took cognizance of the case as S.C. No.197/2001 and thereafter it was made over to the Additional Sessions Court (Adhoc-II) Alappuzha for disposal.

3. When the accused appeared before the court below, after hearing both sides, charge under Section 55(a) and (i) of the Abkari Act was framed against the accused 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 6 were examined and Exts.P1 to P4 and MOs1 to 3 were marked on the side of the prosecution. After closure of the prosecution evidence, the accused was questioned under Section 313 of 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 no article was seized from his possession 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

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enter on his defence. DW1 was examined on the side of the accused and Ext.D1 was marked in the evidence of CW2 as contradiction. After considering the evidence on record, court below found the appellant guilty under Section 55(a) and (i) of the Abkari Act, convicted him thereunder and sentenced him to undergo Rigorous Imprisonment for one year and also to pay a fine of Rs.1,00,000/-. In default to undergo Rigorous Imprisonment for three months more. Set off was allowed for the period of detention has already been undergone by him under Section 428 of the Code. Aggrieved by the same, the present Appeal has been preferred by the appellant before the court below.

4. Heard Sri. N. Asok Kumar, counsel appearing for the appellant and Sri. Jibu P. Thomas, Public Prosecutor appearing for the State.

5. The counsel for the appellant submitted that though the alleged detection was on 24.12.1998, it reached the court only on 15.01.1999 and there is no explanation for the delay. Further, there was some discrepancy in the evidence of witness regarding the place of occurrence. According to the prosecution, the incident occurred on the road in front of the house of one

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Sreedharan,. But, DW1 was examined to prove that there was no such road passing through in front of the house of Sreedharan. So the prosecution has failed to prove the arrest of the accused as claimed by them. The court below was not justified in convicting the appellant for the offence alleged. He has argued that if for any reason, this Court found that the conviction is proper, he prayed for leniency as the accused is aged now 76 years.

6. On the other hand, the learned Public Prosecutor submitted that it will be seen from the property list that the articles were produced before the Magistrate on 24.12.1998 itself and as directed by the Magistrate it was produced before the court on 15.01.1999. So there is no delay in producing the article. Further, evidence of DW1 is not sufficient to come to the conclusion that there was no road there. This was properly appreciated by the court below. No interference is called for according to the prosecutor.

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

8. On 23.12.1998, at about 5.45 pm, while PW1 Preventive Officer along with PW2, another Preventive Officer of

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the same Excise Range were doing patrol duty and when they reached near the house of one Sreedharan, they saw the accused with MO1 kannas in his hand and also a glass and certain people were around him and on seeing the Excise party, the persons around him ran away from the place. They stopped him and on verification of the kannas, they were satisfied that it was arrack. It contained one litre quantity. They took three samples from the liquid, one of which was sent for chemical analysis and other two were produced as MOs2 and 3 before the court. He sealed the samples and seized the same as per Ext.P1 mahazar in the presence of PWs3 and 4. Thereafter, they arrested the accused and came to the Excise Office and produced the accused and the contraband articles before PW5, the Excise Inspector who registered Ext.P2 crime and occurrence report and prepared Ext.P3 property list. He produced the accused before the court on the next day along with the property list, contraband articles and the accused was remanded to custody and the articles were returned for the purpose of producing the same before court on a future date. Accordingly, it was produced on 15.01.1999. The sample was sent from court for analysis and Ext.P4 chemical

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analysis report obtained. PW6 is another Excise Inspector who conducted the investigation and completed the investigation and submitted final report.

8. PWs 3 and 4 were the independent witnesses to the seizure. Though, they admitted their signatures in Ext.P1 mahazar, they denied having seen the seizure. They also stated that they knew the accused. So it is clear from this that they were trying to help the accused and that was the reason that they are not supporting the case of prosecution.

9. PW1 is the Detecting Officer and PW2, another Preventive Officer who accompanied him. PW1 had categorically stated that on 23.12.1998, at about 5.45 pm, they were doing patrol duty and at that time when they reached near the house of one Sreedharan, they saw the accused standing on the side of the road with MO1 cannas in his hand and some people were gathered around him and on seeing the Excise party, the persons around him ran away from the place. When the accused tried to go from the place, they stopped him and examined MO1 cannas and it contained one litre of some liquid which was examined by smelling and tasting and they were convinced that it was arrack.

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Thereafter, PW1 took three sample, out of which, MOs2 and 3 are produced in court, sealed the same and sealed MO1 cannas also and thereafter seized the same as per Ext.P1 mahazar in the presence of PWs3 and 4. Thereafter they came to the Excise Office and produced the accused and the contraband article before PW5, who registered the crime. PW2 corroborated the evidence of PW1 on all these aspects. They denied the suggestion that he was not arrested and no contraband article was seized from him and he has been falsely implicated in the case. So the evidence of PWs 1 and 2 will go to show that the accused was arrested along with MO1 cannas which contained one litre of liquor, which according to the prosecution was arrack.

10. In order to prove the case of the accused that there was no arrest as claimed, he examined DW1 the Village Officer. He had stated that there is no road abutting the house of Sreedharan. But in the cross-examination, he had admitted that there is a property in between the house and the road and he did not know whether it belongs to Sreedharan or his family members. So under the circumstances, it cannot be said that there was no road as claimed by the prosecution near the house

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of Sreedharan from where they arrested the accused and seizure was effected by PW1. So under the circumstances court below has perfectly justified that coming to the conclusion that the prosecution has proved beyond any reasonable doubt that the accused was arrested by PW1 along with MO1 cannas.

11. It is seen from Ext.P3 property list that the articles were produced before the Magistrate on 24.12.1998 itself and it was returned to the Excise officials to produce before the regular court for verification and that regular court can verify and receive the same. Accordingly, it was produced before the regular court on 15.01.1999 and it was entered in the property register on that date. So it cannot be said that there was delay in producing the article. The articles were produced before the Magistrate along with the accused on the date on which he was produced before the Magistrate. So there was no delay in producing the articles as well. Further, the identity of MOs1 to 3 were proved by PWs1 to 2 and there is nothing brought out to discredit the evidence regarding the identity of article as well when they were cross-examined. Ext.P4 chemical analysis report shows that the sample contained 30.22 per cent by volume of ethyl alcohol and

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the accused had no case that it was not arrack. The evidence of PWs1 and 2 who are experienced excise officials that it was arrack was not challenged in cross-examination as well. So it can be safely concluded that the prosecution proved beyond reasonable doubt that the accused was found to be in possession of one litre arrack, possession which is an offence under Section 8(1) of the Abkari Act, though not under Section 55(a) of the Abkari Act as found by the court below and the conviction entered by the court against appellant for possession of arrack is perfectly justifiable and conviction does not call for any interference.

12. As regards the sentence is concerned, the court below has sentenced him to undergo Rigorous Imprisonment for one year and also to pay a fine of Rs.1,00,000/- and in default to undergo Rigorous Imprisonment for three months. The counsel for the appellant submitted that there is no case for the prosecution that he is a habitual offender and is aged 76 years now. Though persons who were committing abkari offences doing the same knowing that it is offence and ignoring the impact of their act on the innocent persons who are consuming the same, court can in certain cases take leniency considering the age,

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contact and quantity seized. In this case, the quantity seized is only one litre. Considering the circumstances, this Court feels that some leniency can be shown in the sentence as minimum fine has already been imposed. So sentencing the accused to undergo Simple Imprisonment for six months and also converting the Rigorous Imprisonment of default sentence to Simple Imprisonment while retaining the fine will not be sufficient and that will meet the end of justice. So the substantive sentence and the nature of default sentence are set aside and the same is modified as follows:

The appellant is sentenced to undergo Simple Imprisonment for six months and also to pay Rs.1,00,000/- in default to undergo Simple Imprisonment for three months more. Set off was allowed for the period of detention already been undergone under Section 428 of the Code.

In the result, the appeal is allowed in part. The Order of conviction passed by the court below against the appellant under Section 8(1)[wrongly quoted the Section as 55(a) by the court below] and a fine of Rs.1,00,000/- imposed are hereby confirmed. The substantive sentence and the nature of default sentence are

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set aside and the same is modified as follows:

The appellant is sentenced to undergo Simple Imprisonment for six months and also to pay Rs.1,00,000/- and in default to undergo Simple Imprisonment for three months . Set off is allowed for the period of detention has already been undergone under Section 428 of the Code. With the above modification of the sentence alone, the Appeal is allowed in part and disposed of accordingly. If any fine amount has already been remitted then the appellant need only deposit the balance fine amount. If he is not depositing the amount, he is entitled to get pro rata remission in the default sentence as provided under Sections 68 and 69 of the Indian Penal Code.

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

Sd/-

**K. RAMAKRISHNAN,
JUDGE**

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P.A. To Judge