

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

MONDAY, THE 27TH DAY OF JULY 2015/5TH SRAVANA, 1937

CRL.A.No. 641 of 2004 (B)

(AGAINST THE ORDER/JUDGMENT IN SC 227/2001 of ADDL.SESIONS COURT
(ADHOC)-II, KOZHIKODE DATED 19-03-2004)

APPELLANT(S)/ACCUSED.:

SUKUMARAN, S/O.KELAN, OOTTAKUNNUMMAL
HOUSE, AVIDANALLUR AMSOM DESOM, KOTTALIDA,
KOZHIKODE DISTRICT.

BY ADV. SRI.T.G.RAJENDRAN

RESPONDENT(S)/COMPLAINANT AND STATE.:

1. THE SUB INSPECTOR OF POLICE,
BALUSSERY.

2. THE CIRCLE INSPECTOR OF POLICE,
BALUSSERY.

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

BY SMT.LALIZA (PP)

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 27-07-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SUNIL THOMAS, J.

Crl.Appeal. No. 641 of 2004

Dated this the 27th day of July, 2015

JUDGMENT

The sole accused in Sessions Case No.227/2001 of the Additional District and Sessions Court, Fast Track,(Adhoc II), Kozhikode for the offence punishable under Section 55(a) of the Abkari Act challenges the conviction and sentence.

2. The prosecution allegation was that on 17/2/2000, at about 6.30. a.m., while the C.I.of Balussery police station, along with the patrolling party, was on their regular patrolling duty, they reached the place of incident and intercepted the accused who was carrying a 10 liter plastic can. The accused was intercepted, searched and it was found that the can contained illicit arrack. After the initial formalities, he was arrested at the spot and later produced before the learned Magistrate. After completion of the investigation, the final

report was laid and the accused faced trial before the Sessions Court.

3. To substantiate the prosecution allegation, PWs1 to 4 were examined and Exhibits P1 to P8 were marked. The accused pleaded not guilty and tendered the defence witness, examined as DW1. The court below, on an evaluation of the available materials, concluded that the accused was guilty under Section 55(a) of the Abkari Act, convicted and sentenced to undergo rigorous imprisonment for six months. Set off was also allowed.

4. Aggrieved by the above conviction and sentence, the accused has preferred this appeal.

5. Heard both sides and examined the records.

6. The prosecution, to sustain the allegation against the accused, mainly relied on the oral testimony of PW1 and PW2 as well as the contemporaneous documents marked as Exts.P2 and P3, along with Ext.P7, the chemical analysis report. There is no dispute that Ext.P7 shows that the samples, which were forwarded to the chemical analysis lab, contained ethyl alcohol.

7. The learned counsel for the accused vehemently contended that the prosecution failed to establish the guilt

against the accused, beyond any reasonable doubt. It was contented that the evidence tendered by the prosecution witnesses were shaky, unreliable and that the process of search, seizure and preparation of the contemporaneous documents were tainted. He pleaded for acquittal. The defence, as set up by the accused in the course of examination and as revealed under Section 313 of Crl.P.C., was that he was falsely implicated. He pleaded that he was called from his house and a false case was foisted on him.

8. There is no doubt that according to the prosecution, it was a chance recovery. PW1 was the detecting officer, who was the C.I. of Balussery police station. According to him, while he was on a law and order patrolling duty, he intercepted the accused, who was standing on the road side. Ext.P2 is the seizure mahahar. According to PW1, the accused was searched, can was found containing arrack and after separation of samples and affixture of labels, he was taken to the police station and the further proceedings followed.

9. It is pertinent to note that there is no independent witness to the alleged seizure. Both the witnesses to Ext.P2

seizure Mahazar Ext.P2 are the police constables. Only one of the witnesses was examined as PW2. Though PW1 and PW2 generally spoke in terms of the inspection, recovery, and the remaining formalities, the only independent witness available was that of Ext.P4 mahazar, who turned hostile. Ext.P4 mahazar shows that the incident occurred on the road side. It was about 50 meters away from the market place. The mahazar also indicate that there were several houses around the place of incident. The incident happened at 6.30 a.m. PW1 in his evidence admitted that there were several houses and shops around the place of the incident and road had reasonably good traffic. He also deposed that he was present at the spot for almost half an hour. However, it is strange that absolutely no independent witness was there to witness the entire process. It appears to be highly doubtful especially in the background that Ext.P3, which is the arrest memo stated to be contemporaneously prepared had an independent witness, Sasi. However, he was also not examined. Prosecution has absolutely no explanation as to why the said Sasi has not witnessed the search and seizure.

10. The accused has a specific case that he was not

involved in any other case and was falsely implicated. To substantiate his contention that he was called from his house during midnight, his 12 year old son was examined as DW1. He deposed that two police personnels came to his house and took his father to the police station. Thereafter, he did not return and was in jail. He was released only after several days of detention. It is pertinent to note that regarding the actual apprehension of the accused from the spot, PW1 and PW2 had given divergent versions. PW1 stated that the jeep was stopped in front of the accused and he was searched and apprehended at the spot. On the other hand, PW2 who was claimed to be a witness to the seizure, admitted that he was a constable attached to the police station and was driving the jeep. He deposed that the jeep was stopped about 50 meters away from the place where the accused was standing, they went near him and caught him from behind. It appears that there are substantial variations in the version of PW1 and 2.

11. It is pertinent to note that regarding the process of separation, sampling and labeling, there is divergent evidence. PW1 in his evidence has deposed that the accused was arrested

by him and thereafter arrest memo was prepared. According to him, the accused was intercepted at 6.30. a.m. and the arrest was recorded at 6.35 a.m. Sequence of incident, as mentioned in Ext.P2, coupled with the oral testimony of PW1, indicates that immediately after the alleged inspection, the accused was arrested. Sampling and all other formalities seems to have been done only thereafter. He deposed that sample was separated and labels were affixed on the sample. PW2 further improved the version by stating that flap was affixed and the seal was affixed on the spot. However, he admitted that the process of sampling, affixture of labels and sealing was not revealed by him to PW4, the investigating officer, when his statement was recorded. PW4, the Investigating Officer, admitted that PW2 did not reveal to him about the labeling process. It is pertinent to note that Ext.P2 seizure mahazar is absolutely silent regarding the process of sampling, labeling and affixture of seal. This has to be appreciated in the background of the defence case that the accused was taken into custody from his house. It is also pertinent to note that in the seizure mahazar the sample seal is not seen affixed. Evidently the law does not prescribe in so

many words that the process of the entire details regarding the search, seizure, sampling, labeling and other acts should be reproduced in detail in the contemporaneous documents. However, it add to the reliability and lack of such details cast doubt on the process of detection, especially when it is seriously disputed.

12. PW2 in his evidence has stated that after opening the can he smelled and tasted to identify the contents. However, version of PW1 does not disclose it, which is also not seen recorded in Ext.P2.

13. It is pertinent to note that search and seizure was allegedly conducted on 17/2/2000. Exts.P1 to P3 are seen prepared on the same day and seems to have reached the court on the same day along with the accused. However, the sample reached the court only on 19th. This was explained by PW4, the Investigating Officer by stating that he took over the investigation on the same day and he was entrusted the articles seized by the detecting officer. He took the samples to the court on the same day, but the property clerk was on leave and hence it was returned. It was thereafter produced in the court only on

19th. It is pertinent to note that Ext.P5, form 151A, bears the date of 19/2/2000. In none of the documents produced in court, there is an endorsement that the material objects and the sample were produced in the court on the same day, and that it was returned on the ground of leave of property clerk. This casts doubt on the prosecution case.

14. Another contention set up by the learned counsel for the accused was that the detecting officer was the C.I. of Police and the investigating officer was his subordinate sub inspector. Even though there is no legal embargo as such, it would always be better to have another officer than the subordinate of the detecting officer. There is absolutely nothing to show that any prejudice was caused to the accused. However, it is pertinent to note that in a case where the evidence appears to have been shaky and the search apparently appears to be in perfunctory manner, this looms large.

15. Evaluation of the entire materials show that the prosecution evidence appears to be doubtful. They have not succeeded in proving the prosecution allegation beyond any shadow of doubt. In the light of the above shaky and doubtful

evidence, it may not be safe to convict the accused and hence, I feel that benefit of doubt should be extended to the accused and he is liable to be acquitted.

For the reason mentioned above, the conviction and sentence imposed by the court below are set aside. The appeal is allowed. The accused is acquitted. Bail bond executed by him stands discharged. The accused shall be released from the jail, if he is in custody, unless his presence is essential in any other case.

Sd/-

SUNIL THOMAS

Judge

dpk

/true copy/ PS to Judge.

