

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

WEDNESDAY, THE 16TH DAY OF SEPTEMBER 2015/25TH BHADRA, 1937

CRL.A.No. 682 of 2004 (C)

AGAINST THE JUDGMENT IN SC 453/2000 of ADDITIONAL DIST. & SESSIONS
COURT (ADHOC)-II, KOLLAM, DATED 23-03-2004.

APPELLANT (S) /ACCUSED:

NATARAJAN, S/O. SANKU,
PUTHENPARATHARA VEEDU, THAZHAM MURI,
EAST KALLADA VILLAGE.

BY ADVS.SRI.T.M.CHANDRAN
SRI.R.ARUN

RESPONDENT (S) /COMPLAINANT:

STATE OF KERALA,
REPRESENTED BY THE SUB INSPECTOR OF POLICE,
EAST KALLADA THROUGH PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SMT.SEENA RAMAKRISHNAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 16-09-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SS

K. RAMAKRISHNAN, J.

Crl. Appeal No.682 of 2004

Dated this the 16th day of September, 2015

JUDGMENT

Accused in S.C.No.453/2000 on the file of the Additional Sessions Court(Ad hoc-II), Kollam, is the appellant herein. The appellant was charge-sheeted by the Sub Inspector of Police, East Kallada in Crime No.99/1998 of that police station under Section 55(a) of Abkari Act, (which ought to be under Section 8(1) and (2) of the Abkari Act).

2. The case of the prosecution in nut shell was that, on 19.06.1998 at about 06.00 p.m., the accused was found to be in possession of 3 liters of arrack, transitting the same along the nadavarampu leading to Thazhomkunnuthara colony from Koduvila-Parappuram road, in violation of the provisions of Abkari Act and thereby he had committed the offence punishable under Section

55(a) of the Kerala Abkari Act.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court-I, Kollam, and the case was taken on file as C.P.No.189/1998, 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 Sessions Court, Kollam had taken cognizance of the case as S.C.No.453/2000 and it was made over to the Additional Assistant Sessions Court, Kollam, for disposal. Thereafter the Sessions Judge, Kollam, withdrew the case from Additional Assistant Sessions Court, Kollam, and made over the same to Additional Sessions Court (Ad hoc-II), 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 (which ought to have been

under Section 8(1) and (2) of the Abkari Act) as possession of arrack is punishable under that section after the amendment) 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 P4 and MO1 were marked on the side of the prosecution. 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 and convicted him there under and sentenced him to undergo rigorous imprisonment for two years and also to pay a fine of ₹1,00,000/-, in default to undergo simple imprisonment for 9 months. 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 Sri.R. Arun, counsel representing Sri.T.M.Chandran, counsel for the appellant and Smt. Seena Ramakrishnan learned Public Prosecutor appearing for the State.

6. The counsel for the appellant submitted that, independent witnesses to the seizure did not support the case of the prosecution and it is not safe to rely on the official witnesses alone to prove the seizure especially when

the detection and investigation was conducted by the same person. Further there was a delay of 10 days in producing the contraband article before the court. It was not mentioned in the mahazar regarding the nature of seal used and the forwarding note was not marked in the case as well. So under such circumstances, it cannot be said that the prosecution has proved the case beyond reasonable doubt that the same article alleged to have been seized from the possession of the accused had reached the court in tamper proof condition and the chemical analysis report relates to the respective sample taken from the contraband article alleged to have been seized from the possession of the accused and as such he is entitled to get acquittal.

7. On the other hand, the learned Public Prosecutor submitted that the evidence of PWs 3 and 4 will go to show that the accused was arrested along with the contraband article and PW1 had deposed that he was in

possession of the article till it was produced in court and there is no possibility of tampering. These aspects were considered by the court below and rightly convicted the accused for the offence alleged.

8. The case of the prosecution as emerged from the prosecution witnesses was that, on 19.06.1998 at about 06.00 p.m., while PW4 the Sub Inspector of police, Kollam East Police Station was doing patrol duty along with PW3 and others and when they reached the south western corner of the house of the accused, they saw the accused coming along the nadavarampu with MO1 kannas and on seeing the police party he tried to move away from that place. So they stopped him and PW4 examined the contents of the kannas and found that it contained three liters of arrack, which he was satisfied on smelling and tasting. He convinced the same to the witnesses present. Thereafter he took sample and sealed the sample bottle and labeled the same and also

sealed the kannas and labeled the same and seized both these articles as per Ext.P1 mahazar. Thereafter he came to police station along with accused and the contraband article and registered Ext.P2 first information report as Crime No.99/1998 of East Kallada police station under Section 55(a) of the Abkari Act against the appellant. Thereafter he had undertaken the investigation. He prepared Ext.P3 property list and sent the same to court along with contraband article seized. He produced the accused along with remand report and he was remanded to custody. On the basis of the request made by him, the sample was sent for analysis and Ext.P4 report obtained. He questioned the witnesses and recorded their statements. He completed the investigation and submitted final report.

9. PWs 1 and 2 are independent witnesses to the seizure. Though they admitted their signatures in Ext.P1, they denied having seen the actual seizure. They

also admitted that they knew the accused person. So it is clear from this that now they are trying to help the accused and that was the reason why they are not supporting the case of the prosecution.

10. Then the available evidence is that of PW5, the detection officer and PWs 3 and PW4, the accompanying officers. PW5 had deposed about the seizure and arrest of the accused. He had also deposed that, he had taken sample and sealed and tasted the same and also sealed and labeled the kannas also in the manner in which he had sealed the sample. He had also deposed that he had arrested the accused and seized the articles as per Ext.P1 mahazar. The evidence of PW5 on this aspect was corroborated by the evidence of PW3 and PW4 as well. So under the circumstances, court below was perfectly justified in coming to the conclusion that the prosecution was able to prove that MO1 kannas was seized from the possession of

the accused with some liquid said to be arrack.

11. But that alone is not sufficient to convict the accused for the offence, unless it is proved by the prosecution that the article alleged to have been seized from the possession of the accused are the same article produced in court in a tamper proof condition and the chemical analysis report relates to that article. Merely because detection and investigation was conducted by the same officer alone is not sufficient to acquit the accused on that ground, unless prejudice was established by the accused. No such prejudice was established in this case. Since detection and investigation had conducted by the same person and he is entitled to get acquittal cannot be accepted.

12. It was admitted by PW5 as per Ext.P3 property list, it will be seen that the contraband articles reached the court only on 29.06.1998. According to PW5,

though he produced the thondy articles on the next day itself, the thondy clerk returned the same and that was the reason for the delay. But no such endorsement was seen in Ext.P3 property list. So the evidence of PW5 on this aspect cannot be accepted. Further the thondy clerk was also not examined to prove this fact. It is not clear from Ext.P1 mahazar regarding the capacity of the bottle in which the sample was taken. It was mentioned in the mahazar that 350 ml liquid was taken as sample. But only at the time of evidence PWs 3, 4 and 5 had stated that it was in a 375 ml capacity bottle. The nature of seal used for sealing the articles was not mentioned in the seizure mahazar. The specimen impression seal was not seen put either in the seizure mahazar or in the property list produced. The forwarding note was not marked in this case so as to ascertain as the nature of seal used for sealing the article as well. So under such circumstances, the delay in producing

the article looms large in such case so as to come to the conclusion as to whether same article alleged to have been seized from the possession of the accused had reached the court and the sample said to have been taken is the same sample that was sent for analysis and the chemical analysis report relates to that sample.

13. In the decision reported in **Ravi v. State of Kerala and another (2011(3) KHC 121)**, the Division Bench of this court has held that, mere delay in production of the article alone is not sufficient to acquit the accused and if sufficient explanation has been given and that explanation is acceptable then the delay in production of article can be ignored by the court. If the explanation is not acceptable or no explanation is given for the delay, then that benefit must be given to the accused and it cannot be said that the prosecution had proved the case beyond reasonable doubt. Further in the decision reported in

Sasidharan v. State of Kerala (2007(1) KLT 720), the Single Bench of this Court has held that, prosecution has a duty to prove that it was the sample taken from the contraband liquor seized from the possession of the accused which had reached the hands of chemical examiner in a full proof condition, unless this is proved, it cannot be said that the prosecution has proved the case against the accused beyond reasonable doubt. In this case also merely because PW5 had stated that he was in possession of the article till it was produced in court, that alone is not sufficient to come to the conclusion that he has explained the delay in producing the article as observed by this court. The reasons stated by the witness for the delay is not believable or acceptable as well. So the observation made by the court below that since PW5 had stated that, he was in possession of the article, till it was produced in court which was sufficient to come to the conclusion that it was produced in

court in a tamper proof condition is unsustainable in law in view of the dictum laid down in the above decision and also the discussions made by this court regarding this aspect. So the consequent conviction entered by the court below against the appellant under Section 55(a) of Abkari Act is also unsustainable in law and the same is liable to be set aside. The appellant is entitled to get acquittal of the charge leveled against him giving him the benefit of doubt. Since it was found 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 is 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 the appellant by the court below on making necessary application for that purpose before that court.

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

Sd/-

K. Ramakrishnan, Judge

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P.A. to Judge