

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

TUESDAY, THE 15TH DAY OF SEPTEMBER 2015/24TH BHADRA, 1937

CRL.A.No. 690 of 2004 ()

SC.NO.563/2000 OF ADDL.DISTRICT COURT, KOZHIKODE DATED 23-03-2004

APPELLANT/ACCUSED :

**KANARANKUTTY, 45 YEARS OLD,
S/O. CHOYI, PANDARAPARAMBIL HOUSE, POST MANGAD
VIA - UNNIKULAM, QUILANDY TALUK.**

BY ADV. SRI.K.N.SASEENDRAN

RESPONDENT/COMPLAINANT & STATE :

**1. STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR.**

**2. EXCISE INSPECTOR,
BALUSSERRY EXCISE RANGE, KOZHIKODE.**

R1 & R2 BY PUBLIC PROSECUTOR SMT. SEENA RAMAKRISHNAN

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 15-09-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

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K.RAMAKRISHNAN, J.

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Crl. Appeal No.690 OF 2004

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Dated this the 15th day of September, 2015

JUDGMENT

The accused in SC No.563/2000 on the file of the Additional District and Sessions Judge (Adhoc) Fast Track Court No.1, Kozhikode is the appellant herein. The appellant was charge sheeted by the Excise Inspector of Balussery Excise Range in Crime No.19/1998 under Section 55(a) of Abkari Act (ought to have been under Section 8(1) read with Section 8(2) of the Abkari Act).

2. The case of the prosecution in nutshell was that on 30.5.1998, at about 6.30 pm, the accused was found to be in possession of 7 litres of arrack and found transmitting the same along with Panchayath Road from Naroath Angadi to Iyyad via Poompoyil on the south of the house of

Pandarapparambil Ummer Master in violation of the provisions of the Abkari Act and thereby he had committed the offence punishable under Section 55(a) of the Abkari Act.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court-II, Perambra and it was taken on file as CP No.24/2000. Thereafter it was committed to Court of Sessions, Kozhikode by the learned Magistrate under Section 209 of Code of Criminal Procedure (hereinafter referred to as the Code). After committal the Sessions Court, Kozhikode took cognizance of the case as SC No.563/2000 and it was made over to Assistant Sessions Court, Koyilandy originally for disposal.

4. When the case was posted before the Assistant Sessions Court, Koyilandy, the accused appeared and after hearing both sides, charge under Sections 55(a) of Abkari Act was framed and the same was read over and explained to him and he pleaded not guilty. Thereafter the case was

withdrawn by the Sessions Court and made over to the Additional Sessions Court (Adhoc-1) Kozhikode for disposal.

5. In order to prove the case of the prosecution, PWs 1 to 6 were examined and Exts.P1 to P8 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 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 is innocent at the same. Since the evidence in this case did not warrant an acquittal under Section 232 of the Code, the accused was called upon to enter on his defence, but not 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 thereunder and sentenced him to undergo rigorous imprisonment for 3

years and also to pay a fine of Rs.1,00,000/- and in default to undergo rigorous imprisonment for 6 months. Set off was allowed for a period of detention already undergone by him under Section 428 of the Code. Aggrieved by the same, the present appeal has been preferred by the appellant/accused before the court below.

6. Since the counsel appearing for the appellant did not appear inspite of the fact that it was posted in the disposal list, this court has appointed Smt. G. Krishnakumari as Legal Aid Counsel.

7. Heard the Legal Aid Counsel Smt. G. Krishnakumari and Smt. Seena Ramakrishnan, learned Public Prosecutor appearing for the State.

8. Learned Legal Aid Counsel submitted that the independent witness to the seizure turned hostile to the prosecution and except the excise officials, no other evidence to prove that seizure was proper. Further, though the detection was made on 30.5.1998, the articles were

produced before the court only on 2.6.1998 and there was no explanation for the delay. So it cannot be said that the same articles which were seized from the possession of the accused had reached the court and the chemical analysis report relates to the representative samples said to have been taken from the alleged contraband articles seized from the accused. She had relied on the decision reported in *Ravi v State of Kerala and Others* [2011 (3) KHC 121] in support of the case.

9. On the other hand the learned Public Prosecutor submitted that PW1 had stated that he had produced the articles before the court on the same day and court below was perfectly justified in relying on his evidence for the purpose of proving the fact that the articles was produced before the court in time, without any delay. The court below was perfectly justified in relying on the evidence of official witnesses and rightly convicted the accused for the offence alleged.

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

On 30.5.1998, at about 6.30 pm, while PW1 the Preventive Officer in charge of the Excise Inspector along with PWs 2 and 3 were doing patrol duty in their official Jeep and when they reached the place of occurrence, they saw the accused coming with MO1 kannas and on seeing the excise party, he got perplexed. So they stopped him and PW1 examined MO1 kannas, it was having a capacity of 10 litres and it was revealed that it contained 7 litres of liquid and he examined the same by smelling tasting and he was satisfied that it was arrack and he convinced the same to the witnesses and also the officials accompanied him. Thereafter he had taken 180 ml liquid as sample and sealed the same and affixed label containing the signature of himself and witnesses and accused and he had sealed and labelled the MO1 kannas also in the same fashion and seized the same as per Ext.P3 mahazar in the presence of

PWs 4 and 5. He had arrested the accused and prepared Ext.P1 arrest memo. Thereafter he came to the office and registered Ext.P2 crime and occurrence report as Crime No.19/1998 of Balussery Excise Range against the accused under Section 55(a) of Abkari Act. He prepared Ext.P4 property list and Ext.P5 forwarding note and sent the articles to court along with these documents. He had produced the accused before the court on the next day. On the basis of the request made by the Excise Officials, the sample was sent from court to chemical examiners laboratory and Ext.P6 report obtained which shows that it contained 23.51% of volume of ethyl alcohol. The investigation in this case was conducted by PWs 6, he questioned the witnesses and recorded the statements. He completed the investigation and submitted final report.

11. PWs 4 and 5 were the independent witnesses to the seizure. Though they had admitted their signature in Ext.P3 mahazar and labels seen on MO1 kannas, they

denied having seen the actual seizure of the contraband article from the possession of the accused. So their evidence is not helpful to prove the seizure as much. Then the prosecution relies on the evidence of PWs 1 to 3 to prove this fact. PW1 is the detecting officer he had deposed that on 30.5.1998 at about 6.30 pm while he was doing patrol duty along with PWs2 and 3, the excise guards and when they reached the place of occurrence, they saw the accused coming with MO1 kannas. On seeing the Excise party, he got perplexed. So they stopped him. They examined MO1 kannas and convinced that it contained 7 litres of liquid which on further examination by smelling and tasting, he was convinced that it was arrack. Thereafter he arrested the accused and prepared Ext.P1 arrest memo, he took the sample from the liquid and sealed and labelled the same containing the signature of himself and accused and witnesses. Thereafter he sealed and labelled the MO1 kannas also in the same fashion and seized these

articles as per Ext.P3 mahazar. Thereafter he came to Excise office and registered Ext.P2 Crime and occurrence report against the accused. The evidence of PW1 on this aspect was corroborated by the evidence of PWs 2 and 3 the Excise guards as well. Though they were cross examined at length, nothing was brought to discredit their evidence on this aspect. It is settled law that though the independent witnesses to the seizure turned hostile, that is not a ground to acquit the accused. If the court is satisfied with the evidence of the Excise officials that it is trust worthy and believable, then there is nothing wrong for the court to rely on the same and convict the accused. So under the circumstances, in the absence of any evidence adduced to disbelieve the evidence of PWs 1 to 3 on this aspect, the court below was perfectly justified in coming to the conclusion that prosecution has proved beyond reasonable doubt that MO1 kannas contained 7 litres of liquid which was seized from the possession of the accused.

12. Mere seizure of an article alone is not sufficient to convict the accused. It must be proved by the prosecution that the chemical analysis report represents the sample said to have been taken from the contraband article seized so as to convict the accused. In this case it was admitted by PW1 and also seen from Exts.P4 and P5 that the contraband articles alleged to have been seized from the possession of the accused reached the court only on 2.6.1998. PW1 had categorically stated that he did not know the reason for the delay. He had also stated that he did not know as to who was in custody of the article till it was produced before the court on 2.6.1998. It is true that in re-examination he had stated that he had produced the articles before the court on 31.5.1998 along with the accused. But there is no record to substantiate this fact. He has to explain as to why it was produced before the court only on 2.6.1998 which he had failed to explain. The investigating officer had also no explanation for the delay. So in the decision reported in

Ravi v State of Kerala and Others [2011 (3) KHC 121] the Division Bench of this court has held that the delay in producing the article is not always fatal, but if it is not explained by the prosecution then it is fatal. Further in Ext.P1 the nature of seal used for sealing the articles was also not mentioned. So merely because some specimen impression seal was seen in the forwarding note alone is not sufficient to come to the conclusion that it was produced in court without tamper proof condition. Further in the same decision it has been held that it must be proved by the prosecution that the sample drawn from the contraband substance is said to have been seized from the possession of the accused and the same reached to examine in a tamper proof condition. This was so held in the decision reported in Balakrishnan v State of Kerala [2007 KHC 3666] as well. The above principle was approved in Ravi v State of Kerala and Others [2011 (3) KHC 121] . The observation made by the court below that since PW1 had stated that it

was he who had produced the article before the court on the next day itself, the presumption under Section 114 (e) of the Evidence Act will be applicable is unsustainable in law in view of the dictum laid down in the above decision and also in the absence of any evidence to prove that it was produced before the court on the next day itself as claimed by PW1, especially when the documentary evidence produced in court shows otherwise. So under the circumstances, the court below was not justified in coming to the conclusion that the articles were produced in court without inordinate delay and the delay has been explained, if the delay has not been properly explained, then it cannot be said that the link between the contraband articles and the accused with the chemical analysis report has been established, so as to convict him for the offence of possession of the 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 7 litres of arrack and the consequential conviction entered against him for the said offence are unsustainable in law and the same is liable to be set aside. The appellant is entitled to get acquittal of the charges levelled against him giving him the benefit out of.

13. In view of the fact that the appellant is entitled get acquittal. The sentence imposed by the court below is also not proper and so it 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 appellant under Section 55(a) of Abkari Act are hereby set aside. 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. We place the appreciation on record for the manner in which the case was argued by the Legal Aid Counsel Smt. G.Krishnakumari. The lower court is

directed to refund the fine amount, if any deposited by him on making necessary application for that purpose.

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

Sd/–

K.RAMAKRISHNAN, JUDGE

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