

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.696 of 2004 (A)

AGAINST THE JUDGMENT IN SC 297/2001 of ADDL. DISTRICT & SESSIONS JUDGE
(FAST TRACK-II), THIRUVANANTHAPURAM, DATED 31-03-2004.

APPELLANT(S)/ACCUSED:

MOHANAN,S/O.SADASIVAN PILLAI,
RESIDING AT T.C.25/884, NOOLKKADA CHETTIYAR THOPPU,
THAMPANOR WARD, THYCAUD VILLAGE, THIRUVANANTHAPURAM.

BY ADV. SRI.V.R.GOPU

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA,
REP.BY SUB INSPECTOR OF POLICE,
THAMPANOR POLICE STATION, THIRUVANANTHAPURAM,
THROUGH PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SMT.SEENA RAMAKRISHNAN

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

SS

K. RAMAKRISHNAN, J.

Crl. Appeal No.696 of 2004

Dated this the 30th day of September, 2015

JUDGMENT

Accused in S.C.No.297/2001 on the file of the Additional District and Sessions Court (Fast Track-II), Thiruvananthapuram, is the appellant herein. The appellant was charge-sheeted by the Sub Inspector of Police, Thampanoor police station in Crime No.146/1998 of that police station under Section 55(a) of Abkari Act.

2. The case of the prosecution in nut shell was that, on the night of 19.08.1998 at about 12.30 p.m., the accused was found to be in possession of 4 liters of arrack with a glass and an amount of ₹40/- for the purpose of sale on the western side of New Theater, Thampanoor, 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-II,

Thiruvananthapuram, and the case was taken on file as C.P.No.37/1999. Thereafter it was committed to the Sessions Court, Thiruvananthapuram by the learned magistrate under Section 209 of the Code of Criminal Procedure. After committal, the Sessions Court, Thiruvananthapuram had taken cognizance of the case as S.C.No.297/2001 and it was originally made over to the 2nd Additional Assistant Sessions Court, Thiruvananthapuram, for disposal. Thereafter the Sessions Judge, Thiruvananthapuram, withdrew the case from that Court, and made over the same to Additional Sessions Court (Fast Track-II), Thiruvananthapuram, for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under Section 55(a) of the Abkari Act (ought to be under Section 8(1) of 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 4 were examined and Exts.P1

to P5 and MO1, MO2 and MO3 series 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, he had not committed any offence and he has been falsely implicated in the case at the instance of the police driver with whom he had some quarrel, since he did not pay the amount for the articles purchased from the shop. 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. DW1 was examined on the side of the accused to prove false implication. CW1 who was deputed to serve summons on DW1 was examined as court witness. After considering the evidence on record, the court below found the accused had committed the offence under Section 58 of the Abkari Act and convicted

him thereunder 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 2 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.J.Narayana Pillai, counsel representing the counsel for the appellant Sri.V.R.Gopu and Smt. Seena Ramakrishnan, learned Public Prosecutor appearing for the State.

6. The counsel for the appellant submitted that, the case was detected by the police constable and the mahazar was prepared by him and the case was registered by head constable who was not an Abkari Officer under the Act. Further there is no spot sample taken and there is no evidence adduced on the side of the prosecution as to from where the sample was taken, when it was taken and when it

was sent to chemical analysis etc., So the link between the accused and the contraband article has not been established by the prosecution and it cannot be said that the chemical analysis report relates to the representative sample said to have been taken from the contraband article alleged to have been seized from the possession of the accused. Further there was delay in producing the article as well which has not been properly explained. So under the circumstances, the court below was not justified in convicting the appellant and he is entitled to get acquittal.

7. On the other hand, the learned Public Prosecutor submitted that PW2 was in charge of the General Diary of the station at the relevant time and while he was in charge of the Station House Officer, he went for patrol duty and detected the crime and the first information report was registered by the Head Constable who was in charge of the police station at the relevant time. Further the court below had considered all the aspects and rightly

came to the conclusion that the accused had committed the offence and rightly convicted him and no interference is called for.

8. The case of the prosecution as emerged from the prosecution witnesses was that, PW2 was working as police constable in Thampanoor police station at the relevant time and he was in charge of the General Diary, on 19.08.1998 and at about 11.00 p.m., on that date he along with P.C.5476 went for patrol duty and at about 12.30 a.m, of the morning of 20.08.1998, when he reached near Thampanoor bus stand, on the western side of New Theater, he saw the accused coming with MO1 cannas and MO2 glass in his hand and on seeing the police party, he tried to move away from that place. So he stopped him and on verification of the cannas, it was revealed that it contained four liters of some liquid which on further examination he was convinced that it was arrack. On conducting body search of the accused, he was found to be possession of

₹40/-. He arrested the accused and sealed the kannas and seized the same as per Ext.P1 mahazar in the presence of PW1 and another. Thereafter he came to police station and entrusted the accused and the article seized to PW3, another head constable who was in charge of the General Diary at the relevant time. He gave Ext.P2 report on the basis of which PW3 registered Ext.P4 first information report as Crime No.146/1998 of Thampanoor police station under Section 55A of the Abkari Act. Investigation in this case was conducted by PW4, the Sub Inspector of police. He produced the accused and articles seized before court with a remand report and property list respectively. On the basis of his request, sample was sent from court and Ext.P5 chemical analysis report obtained. He questioned the witnesses and recorded their statements. He completed the investigation and submitted final report.

9. PW1 is the attestor to Ext.P1 mahazar. He had admitted the signature in Ext.P1, but he denied having

seen the seizure or arrest of the accused, but he had admitted that accused was found near the New Theater on that day and according to him he signed the mahazar from the police station and not from the place of detection. So it is clear from this that, he is trying to help the accused and that was the reason why he is not supporting the case of the prosecution. Then the evidence is that of PW2, the detecting officer. According to him, he along with another police constable was doing patrol duty. At that time, when he reached the place of detection, he saw the accused coming with MO1 kannas in his hand and on seeing the police party he tried to go away from that place and so he stopped him and on verification of the kannas it was revealed that it was arrack. So he arrested him and seized the kannas as per Ext.P1 mahazar and came back to police station along with the accused and contraband article seized and entrusted both the accused and contraband article to PW3 and gave Ext.P3 report regarding the incident on the basis of which

PW3 registered the crime. He had categorically stated that he was in charge of the police station at the relevant time as entrusted by the Sub Inspector of police and in that capacity he was conducting the patrol duty. If he was in charge of the police station, he will be getting the powers of the Station House Officer and when a crime is committed, he is entitled to detect the same and arrest the accused and produce the accused and the contraband article before the Abkari Officer for further action. So the seizure and arrest of the article by PW2 in the capacity as officer in charge of the police station cannot be said to be illegal. Merely because the independent witness turned hostile is not a ground to disbelieve the prosecution case as well. So under the circumstances, the court below was perfectly justified in coming to the conclusion that the prosecution was able to establish that accused was arrested by PW2 along with MO1 cannas and MO2 glass with cash of ₹40/-. Though DW1 was examined on the side of the accused to prove the false

implication, on going through the evidence of DW1, it will go to show that he cannot be believed and he is a close associate of the accused and he came to court to give evidence as requested by the accused. He did not even make any complaint regarding false implication of the accused before any authority. So under the circumstances, court below was perfectly justified in discarding the evidence of DW1 examined on the side of the accused to prove his case of false implication. Further the remand report will go to show that he had no complaint about the arrest or against the police official. That also falsifies the case of the accused of false implication.

10. Mere seizure of MO1 kannas alone is not sufficient to convict the accused for possession of arrack as claimed by the prosecution. It must be proved by the prosecution that the articles reached the court in tamper proof condition and the chemical analysis report relates to the representative sample said to have been taken from the

contraband article alleged to have been seized from the possession of the accused and unless it is proved by the prosecution the link between the accused and the contraband article, it cannot be said that they have established their case. This was so held in the decision reported in **Sasidharan v. State of Kerala (2007(1) KLT 720)**.

11. In that case it was held that in the case where no spot sample was taken and the sample was taken from court, then the committing magistrate has to take care that contemporary proceedings evidencing the drawing of sample and sending the same to chemical examiner in tamper proof condition are recorded in the proceedings before the court. The Session Judge trying such cases also should ensure that the concerned member of the staff who had drawn the sample and despatched the same to the chemical examiner, duly packed and sealed under the covering letter of the magistrate is examined before court

during trial. The Public Prosecutor in charge of this case also had a duty to file an additional witness list for examining the 'thondy' Section clerk / property clerk concerned so as to establish the nexus between the contraband substance and the accused. In this case none of the witnesses had deposed as to from where the sample was taken, when it was taken etc. The thondy clerk who had drawn the sample and sent the same for chemical analysis was also not examined in this case. Further the property list shows that the thondy articles reached the court only on 25.08.1998, that is five days after the alleged seizure. There is no explanation forthcoming from the side of PWs 3 and 4 as to who was in possession of the article till it was produced before court, so as to rule out the possibility of tampering of the article before it reached the court.

12. In the decision reported in **Ravi v. State of Kerala [2011(3) KHC 121(DB)]**, it has been held that mere delay in producing the article is not always fatal, if it

is properly explained. But if no explanation is forthcoming, then it is fatal and that benefit must be given to the accused. So under the circumstances, in this case the delay in producing the article has not been explained and no evidence adduced that Ext.P5 chemical analysis report relates to the articles said to have been seized from the possession of the accused and the prosecution failed to prove the link between the accused and the contraband article alleged to have been seized and as such court below was not justified in coming to the conclusion that the prosecution has proved the case against the accused beyond reasonable doubt and consequential conviction entered against the accused is 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 fact that, the accused is entitled to get acquittal, 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 58 of the 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 before the court below is directed to be refunded to the appellant 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