IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

THURSDAY, THE 15TH DAY OF OCTOBER 2015/23RD ASWINA, 1937

CRL.A.No. 751 of 2004 (A)

IN SC 296/2002 OF ADDL.SESSIONS COURT (ADHOC)-II, THODUPUZHA

CP 9/2002 OF JUDICIAL FIRST MAGISTRATE COURT-I (FOREST OFFENCES), THODUPUZHA

APPELLANT(S)/ACCUSED:

JOSEPH @ CHERUPPUNJOONJU S/O.OUSEPH,
NADPPARAMBIL HOUSE, EDAMARUK KARA, UDUMBANOOR VILLAGE.

BY ADVS.SRI.T.J.MICHAEL
SRI.P.NOOR SEMIR

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA REPRESENTED BY
PUBLIC PROSECUTOR.

R1 BY ADV. PUBLIC PROSECUTOR SMT. SEENA RAMAKRISHNAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 15-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SKV

K.RAMAKRISHNAN, J.

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Crl. Appeal No.751 OF 2004

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Dated this the 15th day of October, 2015

JUDGMENT

The accused in SC 296/2002 on the file of the Additional Sessions Court (Adhoc-II) Thodupuzha is the appellant herein. The appellant was charge sheeted by the Sub Inspector of Police, Karimannoor Police Station in Crime No.155/2001 under Section 8(1) and 8(2) of the Abkari Act.

2. The case of the prosecution in nutshell was that on 20.8.2001, at about 7.30 pm the accused was found to be in possession of arrack and again on the basis of statement given by the accused on 21.8.2001, two bottles of arrack were seized from the house compound of one Brajeetha and he was found to be in possession of arrack in violation of the provisions of the Abkari Act and thereby he had committed offence punishable under Sections 8(1) and 8(2) of the Abkari Act.

3. After investigation, final report was filed before

the Judicial First Class Magistrate Court-I Thodupuzha where it was taken on file as CP 9/2002. After complying with the formalities, the learned Magistrate committed the case to Sessions Court Thodupuzha, under Section 209 of the Code of Criminal Procedure, where it was taken on file as SC 296/2002 and it was originally made over to Assistant Sessions Court, Thodupuzha for disposal. Thereafter the learned Sessions Judge, Thodupuzha withdrew the case and again transferred the case to Additional Sessions Court (Adhoc-II) Thodupuzha for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under Section 8(1) and 8(2) of the Abkari Act was framed and the same was read over and explained to him and he pleaded not guilty.

5. In order to prove the case of the prosecution, PWs1 to 7 were examined and Exts.P1 to P15, P4(a) and P7 (a) were marked on the side of the prosecution.

6. 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 was working in a chappal company and on 20.8.2001 he had gone for his work and thereafter when he returned home at 8 pm, two police people came to his house and took him to police station and asked whether the arrack seized from the house of Brajeetha belonged to him and he told that he was not having any business of arrack. Ten to Fifty people came to the police station and told that he was not having any arrack business. On the next day at 11 am, 100 people marched to the Police Station in protest against illegal taking of him to Police Station. But they did not release him and he has been falsely implicated in the case and produced before the court and he had not committed any offence. Since the evidence in this case did not warrant an acquittal under Section 232 of the Code of the Criminal Procedure, the accused was called upon 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 8(1) and (2) of the Abkari

Act and convicted him thereunder and sentenced him to undergo rigorous imprisonment for one year and also to pay fine of Rs.1,00,000/- and in default to undergo simple imprisonment for two months. Set of was allowed for the period of detention already undergone by him under Section 428 of the Code. Aggrieved by the same, the above appeal was filed by the appellant/accused before the court below.

7. On 21.5.2015, the counsel for the appellant submitted that the appellant was no more and a report was called for and the learned Public Prosecutor submitted report stating that the accused is no more. Since fine has been imposed as part of the sentence, on the death of the appellant, the appeal will not abate, in view of the proviso to Section 394 of the Code of Criminal Procedure and also in view of the dictum laid down in the decision reported in State of Andra Pradesh v Narasimha Kumar [2006 (3) KLT 505]. So it was decided to dispose on merit. There was no representation for the appellant today, though it was posted in the disposal list from 19.8.2015. So heard the learned Public Prosecutor Smt. Seena Ramakrishnan and

perused the records. The learned Public Prosecutor submitted that there is nothing to interfere in the judgment passed by the court below as the evidence will go to show that the prosecution has proved the case beyond reasonable doubt.

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

On 20.8.2001 in the morning he along with police constable Thajudheen went for patrol duty to ascertain as to whether anybody was engaged in sale of arrack and accordingly at about 6.30 pm, when they reached the place called Cheenikkuzhi, they saw the accused coming with a bag. So they stopped him and Thajudheen asked him and examined the bag and he found 3 bottles of arrack. Immediately he informed the Sub inspector PW7 who came there and examined the contents of 3 bottles found there, of which two bottles were identified as MOS series before the court. He examined the contents of the bottle and he was convinced that it was arrack. So he sealed the bottles, affixed label containing the signatures of himself and

witnesses and seized the same as per Ext.P1 mahazar in the presence of PWs2 and 3. Thereafter he arrested the accused and prepared Ext.P8 arrest memo and conducted body search of the accused and prepared Ext.P9 inspection memo and gave Ext.P10 arrest notice. Thereafter he came to the Police Station along with the accused and the contraband articles and prepared Ext.P7 suo moto report and registered Ext.P7(a) First Information Report as Crime No.155/2001 of Karimannoor Police Station against the accused under Section 8(1) and 8(2) of the Abkari Act. When he questioned the accused, he gave Ext.P4(a) statement regrading the place of concealment of arrack and he told that he would show the place where arrack was concealed and accordingly, on the basis of statement given by the accused as lead by him, they went to the property of Brajeetha and the accused had taken two bottles containing arrack which is satisfied on examination of the liquid by PW7, one of which was marked as MO2. He had affixed the labels with the signatures of himself and accused and sealed the bottle and seized the same as per Ext.P4 mahazar in the

presence of PWs4 and 5. He had prepared Ext.P11 series property lists which were produced before the court and taken by the court as PR Nos.65/2001 and 66/2001. He produced the accused along with the remand report on the next day before the court. He sent Ext.P12 forwarding note for sending the sample S1 and S4 for chemical analysis and they were sent from court for chemical analysis and Ext.P13 chemical analysis report obtained. Ext.P14 series and P15 are the slips prepared by PW7 with the specimen seal impression of the seal used for sealing the articles which were numbered as SI to S5 which were seized as per Exts.P1 and P4 mahazars. The investigation in this case was conducted by PW6, the successor of PW7. He questioned the witnesses and recorded their statements. He completed the investigation and submitted final report.

9. The prosecution relies on the evidence of PWs 1 to 5 and 7 to prove the seizure and arrest. PWS 1 to 3 and PW7 were examined for the purpose of proving the arrest of the accused and seizure of MO1 series along with another bottle which was marked as S1 and sent for chemical

analysis. PW1 had stated that on 20.8.200 she went along with the Police Constable Thajudheen for the purpose of enquiry as to whether any illegal sale of arrack was being conducted as instructed by the Sub Inspector of Police and accordingly at about 6.30 pm on that day when they reached at a place called Cheenikkuzhy, they saw the accused coming with a bag and when he was questioned, he told that he was having arrack in the bag and Thajudheen found that three bottles in the bag. Since he was suspected that it was arrack. He informed the same to PW7 who reached the place and examined the three bottles and seized the same as per Ext.P1 mahazar. He arrested the accused and went to Police Station and registered the case. PWs 2 and 3 were attestors to Ext.P1 mahazar. Though they admitted their signatures in Ext.P1, they denied having seen the actual seizure or arrest of the accused. But both of them have admitted that they knew the accused. So it is clear from this that they were now trying to help the accused and that was the reason why they are not supporting the case of the prosecution.

10. Further it is seen from the evidence of PW7 that after registering the crime, when he questioned the accused again, he gave Ext.P4(a) statement regarding the place where he had concealed some more arrack. Accordingly, on the basis of that statement and as lead by him he went to the property of one Brajeetha and as taken and produced by the accused, he seized MO2 bag and another bottle which was marked as S4 and sent for analysis as per Ext.P4 mahazar in the presence of PWs 4 and 5. PW7 had detailed the manner in which he had sealed the bottles and how the label was affixed and specimen seal impression was put etc. PWs 4 and 5 also admitted their signature in Ext.P4. But they denied having seen the seizure. They have further stated that they knew the accused, but they did not see the arrest of the accused. It is clear from this that they were also now trying to help the accused as he was known to them and that was the reason why they were not supporting the case of the prosecution.

11. Though the accused had a case that he was taken from his house as he did not state as to whether he was the

owner of the contraband articles seized from the property of Brajeetha, he has been falsely implicated in the case and also he had a case that people in the locality had protested by taking a march to the Police Station regarding his illegal custody, no evidence was adduced on the side of the accused to prove these fact. If such a march was conducted, there would be evidence to prove this fact. So in the absence of any evidence adduced on the side of the accused regarding his plea on false implication, it can only be rejected as not supported by any evidence. There is nothing to disbelieve the evidence of PWs1 and 7 regarding the seizure of MO1 series and MO2 and two bottles sent for analysis which were marked as S1 and S4 by PW7 and the accused was arrested from the spot. The recovery of MO2 can be relied on under Section 27 of the Evidence Act as those articles were seized on the basis of the confession statement given by the accused which was marked as Ext.P4 (a). So under the circumstances, the court below was perfectly justified in coming to the conclusion that the accused was arrested along with arrack.

12. It is seen from the evidence of PW7 that the articles were produced before the court along with the accused on the next day of seizure of MO1 series and on the same day of seizure of MO2 and another bottle as per Ext.P11 series property lists. It is seen from the evidence of PW7 that he gave Ext.P12 forwarding note on the basis of which the bottles marked as SI and S4 were sent for chemical analysis from court and Ext.P13 chemical analysis report obtained. It will be seen from the evidence of PW7 coupled with Exts.P14 series and P15 and Ext.P12 that specimen seal impression used for sealing the articles were sent to court promptly and Ext.P13 chemical analysis report shows that the seal seen on the bottles tallied with the sample seal provided. That shows that articles were produced before the court in a tamper free condition and Ext.P13 chemical analysis report relates to the representative sample said to have been taken from the contraband article seized from the possession of the accused.

13. Ext.P13 shows that the sample contained 32.56

and 31.69% by volume of ethyl alcohol respectively. The accused has no case that the article seized was not arrack. So the court below was perfectly justified in coming to the conclusion that the prosecution has proved beyond reasonable doubt that accused was found to be in possession of arrack which is punishable under Section 8(1) read with Section 8(2) of the Abkari Act and rightly convicted him for the said offence and that finding does not call for any interference.

14. As regards the sentence is concerned, the court below had sentenced him for rigorous imprisonment for one month and also to pay a fine of Rs.1,00,000/- in default to undergo simple imprisonment for two months. Since the accused is no more, the substantive sentence and default sentence cannot be enforced against him. The sentence cannot be set to be excessive also. The fine amount can be realised from the property if any left by the accused by the court below by initiating proceedings under Section 421 of the Code of Criminal Procedure. So the appeal fails and the same is hereby dismissed with the

above observation.

Office is directed to communicate this judgment to the court below at the earliest.

Sd/-
K.RAMAKRISHNAN, JUDGE

SKV