

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

WEDNESDAY, THE 27TH DAY OF MAY 2015/6TH JYAISHTA, 1937

CRL.A.No. 774 of 2004 ()

AGAINST THE JUDGMENT IN SC 406/2001 of ADDL.SESIONS COURT (ADHOC)-
II, THODUPUZHA DATED 05-05-2004

APPELLANT(S)/ACCUSED::

RAGHAVAN, AGED 68 YEARS,
S/O. GOVINDAN, KARINTHIRA ESTATE
20 MURILAYATHIL HOUSE, CHAPPATH KARA
UPPUTHARA VILLAGE.

BY ADV. SRI.K.R.SACHIDANANTHAN

RESPONDENT(S)/COMPLAINANT::

STATE OF KERALA, REP. BY THE SUB INSPECTOR OF POLICE,
UPPUTHARA POLICE STATION
(BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA
ERNAKULAM.)

BY PUBLIC PROSECUTOR SMT.MAYA P.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 27-05-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.T. RAVIKUMAR, J.

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Crl.A. No.774 OF 2004

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Dated this the 27th day of May, 2015

JUDGMENT

This appeal is directed against the conviction and the sentence passed by the Court of Additional Sessions Judge (Ad hoc)-II, Thodupuzha in S.C.No.406 of 2001 against the appellant in a prosecution for offences punishable under section 55(a) and (i) of the Abkari Act. Upon conviction, the appellant was sentenced to undergo rigorous imprisonment for one year and to pay a fine of 1,00,000/- (Rupees one lakh only). In default of payment of fine, he was ordered to undergo simple imprisonment for a further period of two months. When this case is taken up for hearing, there is no representation for the appellant. This case was admitted as early as on 18.5.2004 and the appellant was enlarged on bail on that day itself. Considering all such aspects, I am of the view that the appeal can be decided on merits.

2.The case of the prosecution was that on 7.5.2000 at about 10.15 a.m, the appellant was found in possession of a black jerry can containing 2 litres of arrack and, a glass for the purpose of sale of arrack, without any license or permit in terms of the provisions of the Abkari Act. The liquid in the can was smacked of arrack and the glass also found to have the odour of arrack. Sample of the contraband liquid was taken in a bottle having a capacity of 150 ml and the same and the can with the residue were sealed and labelled. After arresting him under Ext.P2 arrest memo, he was brought to Upputhara Police Station along with the seized articles. Crime No.102/2000 of that police station was registered and after the investigation thereon, final report was filed which ultimately led to the aforementioned Sessions Case.

3.To prove the case against the appellant, prosecution has examined PWs 1 to 5 and got marked Exts.P1 to P8 besides identifying MO1 and MO2 series of notes. After closing the

prosecution evidence, the appellant was examined under section 313 Cr.P.C and he denied all the incriminating circumstances put to him. It was found that the appellant-accused could not be convicted under section 232 Cr.P.C and therefore, he was called upon to enter on his defence. However, he has not adduced any evidence, either oral or documentary. On appraisal of the evidence on record, the trial court found that the appellant was found in possession of illicit arrack and thereby he has committed offence under section 55(a) of the Act. The prosecution has failed to establish that the arrack was intended for sale and accordingly, he was found not guilty under section 55(i) of the Abkari Act. Consequently, he was convicted under section 55(a) of the Abkari Act and sentenced as aforesaid.

4.I have heard the learned Public Prosecutor. PW1 and PW2 are the independent witnesses examined by the prosecution for proving the charge against the appellant. PW1 is the attesting witness to Ext.P1 mahazar and Ext.P2 arrest memo. He would admit his

signatures both in Exts.P1 and P2. PW2 is another attesting witness to Ext.P1 mahazar. He would also admit his signature in Ext.P1 mahazar. A scanning of the evidence of PWs 1 and 2 would reveal that the former admitted his signatures in Exts.P1 and P2 and even while admitting their signatures in Ext.P1, they did not support the case of the prosecution and they denied to have seen the seizure of the contraband liquid from the possession of the appellant. Evidently, the court below permitted the prosecutor to put leading questions. In fact, there is no declaration of those witnesses has hostile. Thus, it is evident that the independent witnesses PWs 1 and 2 admitted their signatures in Ext.P1 (PW1 would admit his signature in Ext.P2 arrest memo as well.). They did not support the case of the prosecution that on 7.5.2000 at about 10.15 am, PW5 and police party found the accused in possession of canful of arrack (2 litres can) and glass, intending for sale. There can be no doubt with respect to the position of law that merely because the independent witnesses for search and arrest turned hostile to the prosecution after admitting their signatures

in the contemporaneous documents, the evidence of the official witnesses could not be discarded for the purpose of arriving the guilt of the accused if their evidence is otherwise trustworthy. In this case, to prove the case against the appellant, besides examining PWs 1 and 2 prosecution had examined PWs 3 to 5 as well. They are admittedly official witnesses. The trial court relied on the evidence of the said official witnesses to enter conviction against the appellant for the offence punishable under section 55(a) of the Abkari Act and consequently, imposed sentence as aforesaid on him. The question is whether the conviction and the sentence imposed against the appellant calls for appellate interference.

5.I have already found that there is no legal bar in prosecuting the case based on the evidence of official witnesses and in such cases even the guilt of the accused could be arrived at relying on the evidence of official witnesses if their evidence is trustworthy despite the fact that the independent witnesses turned hostile. In such

circumstances, I will examine the question whether the evidence of PWs 3 to 5 is trustworthy to form the basis for conviction of the accused. PW3 was the Police Constable then attached to Upputhara Police Station where Crime No.102/2000 was registered from which the aforementioned sessions case arose. He would depose that on 7.5.2000 at about 9 a.m he was among the police party headed by PW5, that conducted the law and order duty. When they reached near the bridge close to the pathway leading from Chappathu Bridge to the Tea Factory, Karintharuvi, they found the accused/appellant standing there holding a plastic can and a glass. Getting suspected of his demeanour, they intercepted him and contents of the can was smelt and tasted. Upon such smelling and tasting, it was identified as arrack. He would also depose that the glass found in possession of the appellant was also having the odour of arrack. Consequently, under Ext.P2 mahazar, the appellant/accused was arrested. The can containing the arrack was seized under Ext.P1 mahazar. From its contents, sample was taken in a bottle having a capacity of 150 ml.

The sample as also the can containing the residue were sealed. It is to be noted that he did not depose as to whether the bottle containing the sample and the can containing the residue were labelled or not and whether signature of the detecting officer, the witnesses as also the accused were affixed on the label. True that in the re-examination, he would depose that an amount of 150 was also seized from the possession of the appellant/accused. PW4 is the investigating officer. He would depose that from 7.5.2000 onwards he was working as Assistant Sub Inspector at Upputhara Police Station and the investigation of crime No.102 of 2000 of that police station was entrusted to him by the Sub Inspector of the said police station. He would further depose that thereafter he had questioned PWs1 and 2 and recorded their statements viz., Exts.P3 and P4 respectively. He would also depose that the S.I of Police subsequently verified the records and filed the charge sheet in the said crime. During the cross examination, he would depose that his investigation was confined only to recording of statements of witnesses and he would depose that

he had not recorded the statements of the S.I who detected the crime. That apart, he would depose that he had not produced the glass seized from the possession of the appellant/accused and would also admit the fact that he was not one among the party that was conducting law and order duty on the date of occurrence. PW5 is the detecting officer in this case. He deposed that on 7.5.2000 upon getting information regarding the sale of illicit arrack near Tea Factory, Karintharuvi Estate, he proceeded to the said place. He would also depose that on his way he had also conducted patrolling in certain other places. When he reached the place of occurrence, he found the appellant/accused carrying a black can and holding a glass. After questioning him, he opened the can and smelt and tasted its contents and identified it as arrack. He would depose that on getting convinced that the can contained about two litres of arrack and that the glass got the odour of arrack, they were seized by him under Ext.P1 mahazar. He deposed that the sample was taken in a bottle having a capacity of 150 ml and therefore, the said bottle containing the sample and the

can containing the residue were sealed. He would also depose that they were labelled after putting signatures by himself, witnesses and the appellant/accused. He identified MO1 can and MO2 series of currency notes. He would depose that he arrested the appellant under Ext.P2 arrest memo and currency notes were also seized under Ext.P1 mahazar. PW5 recorded Ext.P5 F.I.S and it on its basis, registered Ext.P5(a) FIR. He had also prepared Ext.P6 property list and Ext.P7 forwarding note. Ext.P8 is the report of chemical analysis of the sample sent for analysis. Thus, scanning of evidence of PW3 and PW5 would reveal that PW5 deposed to the effect that the sample taken in the bottle and the can containing the residue were sealed and labelled. PW3 would depose only with respect to the sealing of the sample and residue. While PW3 deposed to the effect that though the surroundings were searched, water or soda bottles could not be found out. On the other hand, PW5 deposed that used soda bottles were found in the surroundings. Evidence consisting of oral testimonies of PWs 1 to 5 would reveal that the crime in question was detected by

PW5 and the investigation was conducted by PW4. But a careful scanning of the evidence would reveal that PW5 who detected the crime arrested the accused, prepared Ext.P1 mahazar, Ext.P2 property list and Ext.P7 forwarding note and sent the sample for analysis through court. PW4 who conducted the investigation deposed that he had questioned PWs 1 and 2 and recorded their statements. The impugned judgment would reveal that the appellant herein had taken up a contention that he was entitled to be acquitted on the ground that in the case on hand the detecting officer himself conducted the investigation. It was also contended that investigation was conducted by an officer inferior to the detecting officer. In **Naushad v. State of Kerala [2000 (1) KLT 785]**, this Court held that the complainant and the investigating officer could not be one and the same person. A Division Bench of this Court in **Kader v. State of kerala [2001(2) KLT 407]** overruled the legal position in **Naushads'** case (supra) and held that merely because a detecting officer himself investigated the case it would not vitiate the proceedings in the absence of proof of

specific prejudice to the accused. A careful scanning of the decision in **Kader's** case would reveal that the Division Bench held that in NDPS cases the main part of the investigation would be over at the time when the offence is detected and what would remain to be done in such cases is only sending of samples for chemical analysis and laying of final report in court. In this case, it is evident that PW5 the detecting officer arrested the appellant/accused who seized the contraband liquid and the glass from him for the purpose of sale under Ext.P1 mahazar and he himself registered Ext.P5(a) FIR. That apart, it was he who prepared Ext.P6 property list and Ext.P7 forwarding note and sent samples for chemical analysis. Above all, on receipt of Ext.P8 chemical report, PW5 himself filed the final report. PW5 who conducted the investigation questioned PW2 and PW3 and recorded Exts.P3 and P4 statements. He had also admitted the fact that he had not produced the glass seized under Ext.P1 mahazar allegedly used for sale of arrack and allegedly having the odour of arrack. The trial court found that in a case of offence under the Abkari

Act, by the detection of the offence, arrest of the accused and seizure of contraband article, to a certain extent the investigation would also be completed and in such circumstances nothing would remain for further investigation. It could not be said that an offence would be completed only by its detection and arrest of accused or seizure of the contraband article. In fact, detection of the offence, arrest of the accused and seizure of the contraband article would only follow the commission of the offence. True that in a case of offence under the Abkari Act after detection of the offence arrest of the accused, seizure of the contraband article, what would remain to be done is also sending of the samples for analysis and thereafter filing of the final report. In this case, from the evidence on record, it is evident that PW5 who detected the offence arrested the accused, seized the contraband article and took sample under Ext.P1 mahazar, prepared Ext.P6 property list and Ext.P7 forwarding note and sent the samples for analysis and above all, he himself filed the final report. It is to be noted that it was he who registered Ext.P5(a) FIR. PW4 admittedly

questioned PW1 and PW2. In the light of the decision of this Court in **Sabu v. State of Kerala [2007 (4) KLT 169]** which was affirmed by a Division Bench of this Court in **Subash v. State of Kerala [2008(2) KLT 1047]**, Assistant Sub Inspector of Police is not an officer authorised to conduct investigation. In this case, it is evident that the statements of PWs 1 and 2 were recorded by PW4 who was admittedly incompetent to investigate the offence under the Abkari Act. The complainant in this case is PW5. He has detected the offence arrested the accused, registered Ext.P5(a) FIR and laid the final report also. Admittedly, he was not questioned and statement was also not recorded by the investigating officer. Thus, it cannot be said that major part of the investigation was completed before investigation was entrusted to PW4. The evidence of PW4 would reveal that 7.5.2000, on the date of occurrence, PW5 entrusted the investigation with him and he questioned PWs 1 and 2 and recorded their statements. Thus, it is evident that statements of PWs 1 and 2 were recorded and the investigation was conducted by an incompetent

officer. In the light of the decision in **Sabu's** case (supra), Assistant S.I of Police is not competent to detect an offence under Abkari Act or to conduct the investigation. Though PW4 deposed that the investigation of the aforesaid crime was entrusted to him by PW5, the evidence on record would reveal that after the arrest of the appellant/accused under Ext.P2 memo, PW5 registered Ext.P5 FIR, prepared Ext.P6 property list and Ext.P7 forwarding note and sent the sample for analysis. He laid the final report also. It would reveal that PW4 and PW5 had acted as investigating officers simultaneously. It cannot be said that PW4 had only continued the investigation after taking it over from PW5. In the light of the decision in **Sabu's** case (supra), PW4 was incompetent to conduct the investigation. PWs 1 and 2 did not support the case of the prosecution. PW3 who accompanied PW5 did not corroborate the version of PW5 that after taking the sample in a bottle, the bottle as also the can containing the residue were labelled. Ext.P6 property list and Ext.P7 forwarding note did not contain any endorsement revealing the date of receipt in the Magistrate court.

Ext.P8 chemical report would reveal that reference letter of the Magistrate court is dated 17.5.2000. There cannot be any doubt with respect to the fact that it is the duty of the prosecution to let in evidence that the sample as also the residue were produced before the court without any delay. At any rate, it is the duty of the prosecution to prove that the report revealing the seizure was forwarded to the court without any delay. Such details are required to be established by adducing evidence to ensure that the sample collected from the contraband liquid and the residue were produced before the court without any delay and they were in safe custody from the time of seizure of the contraband liquid and taking of the sample till it reached the court. The official witnesses PWs 3 to 5 did not speak about those relevant aspects. In short, none of the official witnesses deposed as to when the sample and the residue were produced before the court. Such aspects are required to be proved to ensure that after taking the sample, the same was under safe custody till it reached the court and thereafter it reached the public analyst in tamper proof condition.

When there is absolute absence of such aspects it cannot be said that the sample collected was in safe custody and it reached the public analyst in tamper proof condition. The report of the analyst that the sample reached in a tamper proof condition would only reveal that the sample was sent from the court in a tamper proof condition. At the same time, it would not prove that the sample collected was under safe custody and it was the same sample that was taken from the spot that was sent for analysis and that ultimately reached the public analyst for analysis. These aspects were not properly considered by the court below. I am of the view that aspects which were referred specifically hereinbefore could not be said to be mere irregularities or incurable infirmities or illegalities. For the reasons mentioned hereinbefore, it is evident that the prosecution has failed to establish the commission offence under section 55(a) of the Abkari Act by the appellant conclusively. In such circumstances it is not safe to convict the accused and sentence him for the offence under section 55(a) solely based on the evidence of PWs 3 and 5. Consequently, the judgment in

S.C.No.406 of 2001 on the files of the Court of Additional Sessions Judge (Adhoc)-II, Thodupuzha is set aside. This appeal is allowed. The appellant is set at liberty. The bail bonds executed by the appellant shall stand cancelled.

Sd/-

**C.T. RAVIKUMAR
(JUDGE)**

spc/

C.T. RAVIKUMAR, J.

JUDGMENT

September, 2010

