

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

WEDNESDAY, THE 28TH DAY OF OCTOBER 2015/6TH KARTHIKA, 1937

CRL.A.No. 789 of 2004 (A)

SC 997/2002 OF III ADDL.DISTRICT COURT, KOLLAM

APPELLANT(S)/ACCUSED::

**PRASANNAN, S/O. RAGHAVA PANICKAR
MUNDAPPALLIKIZHAKKATHIL, MANAPPALLY
THEKKUMMURI PAVUMBA VILLAGE.**

BY ADV. SRI.C.RAJENDRAN

RESPONDENT(S)/COMPLAINANT::

**STATE OF KERALA, REPESENTED BY THE
SUB INSPECTOR OF POLICE, KARUNAGAPPALLY POLICE
STATION THROUGH THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.**

BY PUBLIC PROSECUTOR SRI. JIBU P. THOMAS

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 28-10-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

SKV

K.RAMAKRISHNAN, J.

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Crl. Appeal No.789 OF 2004

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Dated this the 28th day of October, 2015

JUDGMENT

The accused in SC No.997/2002 on the file of the Additional Sessions Court-III, Kollam is the appellant herein. The appellant was charge sheeted by the Additional Sub Inspector of Police, Karunagappally in Crime No.104/2000 of Karunagappally Police Station under Section 55(a) and (i) of Abkari Act.

2. The case of the prosecution in nutshell was that on 20.2.2000, at about 7.15 pm, the accused was found to be in possession of 3 litres of arrack in 5 litres can for the purpose of sale on the northern property of his house in Manappally Thekkumuri of Pavumba Village in violation of the provisions of the Abkari Act and thereby he had committed the offence punishable under Section 55 (a) and (i) of the Abkari Act.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court-III Karunagappally,

where it was taken on file as CP No.204/2001. After complying with the formalities, the learned Magistrate committed the case to Sessions Court, Kollam under Section 209 of the Code of Criminal Procedure (hereinafter referred to as the Code). After committal, the case was taken on file as SC No.997/2002 and it was made over to Additional Sessions Court-III, Kollam for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under Sections 55(a) and (i) of the Abkari Act was framed and same was read over and explained to him and he pleaded not guilty. In order to prove the case of the prosecution, Pws1 to 5 were examined and Exts.P1 to P3 and MOs 1 and 2 were marked on their side. 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 has been falsely implicated in the case. 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 not guilty for the offence under Section 55(i) of the Abkari Act and acquitted him of that charge under Section 235(l) of the Code, but he was found guilty for the offence under Section 55(a) of the Abkari Act and sentenced him to undergo rigorous imprisonment for three years and also to pay a fine of Rs.1,00,000/- and in default to undergo rigorous imprisonment for ten months. Set off was allowed for the period of detention already undergone by him under Section 428 of the Code. Aggrieved by the same, the above appeal has been preferred by the appellant/accused before the court below.

5. Heard Shri. Ranjith K.R. representing Shri. Rajendran counsel for the appellant and Shri. Jibu P. Thomas learned Public Prosecutor appearing for the State.

6. The counsel for the appellant submitted that independent witnesses to the seizure did not support seizure. Further the detecting officer was not examined in

this case. There was delay of 19 days in producing the article and there is no explanation forthcoming for the delay. Further there was no spot sample taken and no evidence was adduced from where the sample was taken, so as to connect the accused with the chemical analysis report. He had also submitted that PW3 had deposed that the articles were in the custody of CW6 till it was produced in the court but no report has been filed to explain the delay in producing the contraband article seized. So according to the learned Counsel, the court below was not justified in convicting the appellant for the offence alleged. He prayed for allowing the appeal and acquitting the accused.

7. On the other hand the learned Public Prosecutor submitted that the detecting officer could not be examined and he was laid up with illness and the persons who accompanied him have proved the seizure and also arrest of the accused. So according to him, the court below was perfectly justified in convicting the appellant for the offence alleged.

8. The case of the prosecution as emerged from the

prosecution witnesses was as follows:-

On 20.2.2000, at about 7.15 pm, while CW6 the Additional Sub Inspector of Police, Karunagappally Police Station was doing patrol duty along with PWs3 and 4, they got information that the accused was selling arrack near his house and immediately they went to the spot and on seeing the police party, he tried to run away from the place. So they stopped him and CW6 found MO1 cannas and MO2 glass in the hands of the accused. On examination, of the cannas, he found 3 litres of liquid, which on further examination he was satisfied that it was arrack. He arrested the accused and gave intimation of arrest to his relative. He sealed the cannas and seized the same along with MO2 glass as per Ext.P1 mahazar in the presence of PWs1 and 2. Then came to the Police Station along with the accused and the contraband articles seized and registered Ext.P2 First Information Report as Crime No.104/2000 of Karunagappally Police Station against the accused for the offence under Section 55(i) of the Abkari Act. He produced the articles before the court and produced the accused

along with remand report. The sample was sent from court for analysis and Ext.P3 chemical analysis report obtained which will go to show that it contained 29.79% by volume of ethyl alcohol. The investigation in this case was conducted by PW5, the Assistant Sub Inspector of Police. He questioned the witnesses and recorded their statements. He collected the chemical analysis report and produced before the court. The investigation conducted by PW5 was verified by CW6 and he completed the investigation and submitted final report.

9. PWs 1 and 2 were the independent witnesses to seizure who have did not support the case of the prosecution regarding the seizure of the contraband articles and arrest of the accused, though they have admitted the signature in Ext.P1. Both of them have stated that they knew the accused. So it is clear from that they were now trying to help the accused and that was the reason why they were not supporting the case of the prosecution.

10. The detecting officer was not examined in this case as it is seen from the judgment that he was not

available for giving evidence due to his illness. The prosecution relies on the evidence of PWs 3 and 4, the police constables who accompanied CW6. They have categorically stated that they were doing patrol duty along with CW6, the Additional Sub Inspector and at about 7.15 pm, they got information that the accused was selling arrack from his property. So they went to the spot and saw the accused with MO1 kannas and MO2 glass in his hand and on seeing the police party, he attempted to run away from the place. So they stopped him. CW6 examined the contents of the kannas by smelling and tasting and satisfied that it was arrack. He convinced the same to the witnesses as well. Thereafter, he arrested the accused and sealed the kannas and seized the same as per Ext.P1 mahazar in the presence of PWs1 and 2. Thereafter they came to the Police Station and registered the case. The accused was produced before the court along with remand report. Though they were cross examined at length, nothing was brought out to discredit their evidence on this aspect. Merely because the independent witnesses to seizure did not support the case

of the prosecution is not a ground to disbelieve the prosecution case and the court can rely on the evidence of official witnesses to prove the seizure, if court is satisfied with its trustworthiness. In this case, there is nothing brought out to discredit the evidence of PWs3 and 4 regarding seizure and arrested the accused. So it can be safely concluded that the prosecution has proved that the accused was arrested with a cannabis said to be contained in a glass.

11. Mere seizure of a cannabis with some liquid alone is not sufficient to convict the accused for the offence alleged. It must be proved by the prosecution that the articles seized were the same articles produced in court and the chemical analysis report relates to the representative sample said to have been taken from the contraband article said have been seized from the possession of the accused. In this case there was no spot sample taken. Further it is seen from the evidence that the articles were not produced in court immediately. It is seen from the property list which was not marked that articles were produced before the court

only on 10.3.2000, though the alleged detection was on 20.2.2000. Further it is seen from the property list that the description of the kannas does not show that the kannas was sealed. What is produced is that 5 litres kannas with 3 litres arrack and a glass. Further there is no explanation forthcoming from the side of the prosecution for the delay in producing the article as well. Further the Thondi Clerk who had drawn the sample was not examined as well.

12. In the decision reported in Sasidharan v State of Kerala [2007 (1) KLT 720], it has been observed by this Court that without the link evidence of actual sampling by the concerned Clerk of the court by drawing the sample from the can and sending the same in a sealed packet to the chemical examiner with a specimen seal sent separately for proving tamper proof despatch. The prosecution cannot be held to have brought home the offence against the appellant. The prosecution had a duty to prove that it was the sample taken from the contraband liquor seized from the accused which had reached in the hands of chemical examiner in tamper proof condition. In the same decision,

it has been observed that committing Magistrates have to take care that contemporary proceedings evidencing the drawing of sample and sending the same to the chemical examiner in a tamper proof condition are recorded in the proceedings before court. Sessions 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 to the Magistrate examined before the court during trial. The Public Prosecutor in charge of the case also had a duty to file an additional witnesses list for examining the thondi session clerk (property clerk) concerned so as to establish the nexus between the contraband substance and if the accused and if this is not done, then that benefit must be given to the accused and he is entitled to get acquittal.

13. In that case also, there was no spot sample taken and sample said to have been taken from the court was sent from court. But the thondi clerk was not examined and there was delay in producing the article as

well. All these things were cumulatively taken into account by this court and granted the benefit and acquitted the accused and though he was convicted by the court below.

14. Further 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 producing the article alone is not sufficient to doubt the genuineness of the article produced, if it is properly explained, to the satisfaction of the court. If it is properly explained then court can ignore the delay, but if it is not properly explained, then that benefit must be given to the accused.

15. In this case also there is no acceptable evidence adduced on the side of the prosecution to prove the reason for the delay in not producing the article before the court. Though the detection was on 20.2.2000 the articles were seen produced before court only on 10.3.2000, nearly after 18 days of the alleged seizure. Further in the property list, it was not mentioned that the cannas was sealed as well. So under the circumstances, it cannot be said that the prosecution has established that the articles alleged to have

been seized from the possession of the accused had reached the court in a tamper free condition and sample was taken from that article from court and the chemical analysis report relates to that representative sample said to have been taken from the contraband articles said to have been seized from the possession of the accused. So under the circumstances, it cannot be said that prosecution has proved beyond reasonable doubt that the accused had committed the offence and the court below has not considered these aspects before convicting the accused for the offence under Section 55(a) of the Abkari Act and the same is unsustainable in law and the appellant is entitled to get acquittal of the charge levelled against him giving him the benefit of doubt.

16. In view of the finding 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 (ought to be under Section 8(1) and (2) of the Act) are hereby set aside. 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 stands cancelled. The court below is directed to refund the fine amount, if any remitted by the appellant to him on making necessary application for that purpose.

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

Sd/-
K.RAMAKRISHNAN, JUDGE

SKV