

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

FRIDAY, THE 13TH DAY OF NOVEMBER 2015/22ND KARTHIKA, 1937

CRL.A.No. 801 of 2004 ()

AGAINST THE JUDGMENT IN SC 137/2002 of ADDL.SESIONS COURT (ADHOC)-II,
KOZHIKODE DATED 26-04-2004

APPELLANT/ACCUSED: :

1. MANOJ, S/O. RAMAN,
PINDAM NEEKKIYIL HOUSE, KINALUR AMSOM,
POONATH DESOM.

2. RAJESH, S/O. KUMARAN,
CHANGAROTH KUNNUMMAL HOUSE,
AVIDANALLUR AMSOM
POONATH DESOM.

3. PRADEEP KUMAR, S/O. VASU,
PINDAM NEEKKIYIL HOUSE, AVIDANALLUR AMSOM
POONATH DESOM.

4. VINOD, PARAMESWARAN,
KUNNIKKOOTTATHIL HOUSE, AVIDANALLUR AMSOM
POONATH DESOM.

5. SANTHOSH, S/O. BHASKARAN,
PINDAM NEEKKIYIL MEETHAL HOUSE,
AVIDANALLUR AMSOM
POONATH DESOM.

BY ADV. SRI.SUNNY MATHEW

RESPONDENT/COMPLAINANT: :

STATE OF KERALA THROUGH THE
SUB INSPECTOR OF POLICE,
ATHOLI POLICE STATION
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.

BY P.P.SRI.JIBU P.THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 13-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. RAMAKRISHNAN, J.

.....
Crl.A.No.801 of 2004
.....

Dated this the 13th day of November, 2015

JUDGMENT

Accused 1 to 5 in SC.No.137/2002 on the file of the Additional Sessions Court, Fast Track-II, Kozhikode are the appellants herein. The appellants were charge sheeted by the Sub Inspector of Police, Atholi police station in Crime No.58/2000 of that police station under sections 55(a), (i) and 58 of the Abkari Act.

2. The case of the prosecution in nutshell was that, on 9.4.2000, at about 10.05 p.m, the accused were found jointly transporting nine plastic cans each containing 35 litres of arrack for the purpose of sale in the jeep with No.KLL 3013 through the public road from Kannadipoyil to the mud road near Sathya Narayana Temple at Kuttoth in Ulliyeri amsom desom and they did not stop the vehicle in spite of the signal shown by the Circle Inspector of Police and it was driven by the first accused and they abandoned the articles and third accused was arrested from the spot and thereby all of them have committed the offences punishable under sections 55(a),(i) and 58 of the Abkari Act.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court, Quilanday, where it was taken on file as C.P.No.70/2000. After complying with the formalities, the learned Magistrate committed the case to Sessions Court, Kozhikode under section 209 of the Code of Criminal Procedure (hereinafter referred to as 'the Code') and the learned Sessions Judge took cognizance of the case as S.C.No137/2002 and originally made over the case to the Assistant Sessions Court, Quilandy for disposal. Thereafter the case was withdrawn by the learned Sessions Judge and it was made over to the Additional Sessions Court, Fast Track- II, Kozhikode for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under sections 55(a), (i) and 58 of the Abkari Act and sections 132 and 177 of Motor Vehicles Act and Rule 150 of the Motor Vehicles Rules was framed and the same were read over and explained to them and they pleaded not guilty. In order to prove the case of the prosecution, Pws 1 to 5 were examined and Exts.P1 to P9 and Mo1 series were marked on the side of the prosecution. After closure of the prosecution evidence, the accused were

questioned under section 313 of the Code and they denied all the incriminating circumstances brought against them in the prosecution evidence. They have further stated that they have been falsely implicated in the case. Since evidence in this case did not warrant an acquittal under section 232 of the Code, the accused were called upon to enter on their defence, but no defence evidence was adduced on their side. After considering the evidence on record, the court below found accused 1 to 5 guilty for the offence under sections 55(a), (i) and 58 of the Abkari Act and sentenced them to undergo rigorous imprisonment for three years each and also to pay a fine of Rs. One lakh each, in default to undergo rigorous imprisonment for six months each under sections 55(a), (i) and 58 of the Abkari Act and first accused was further found guilty for the offence under section 132 read with section 177 and Rule 150 read with section 177 of the Motor Vehicles Act and convicted him thereunder and sentenced him to pay fine of Rs. 100/-, in default to undergo simple imprisonment for 5 days under section 132 read with section 177 of the Motor Vehicles Act and further sentenced to pay a fine of Rs. 100/-, in default to undergo simple imprisonment for 5 days under Rule 150 read

with section 177 of the Motor Vehicles Rules and directed the substantive sentences to run concurrently. Aggrieved by the same, the above appeal has been preferred by the appellants/accused before the court below.

5. Heard Sri. Sunny Mathew, counsel appearing for the appellants, and Sri.Jibu P. Thomas, Public Prosecutor appearing for the State.

6. Counsel for the appellants submitted that there is no proper identification of accused 1, 2, 4 and 5 and they were not arrested from the spot and they were not identified by the witnesses later as well. Further, independent witnesses to the seizure did not support seizure or arrest of the accused. So, there is no proper evidence to prove identity of accused 1, 2, 4 and 5, who were said to be in the vehicle alleged to have transported the contraband article as claimed by the prosecution. Further, the third accused was only a passenger in the vehicle and there is nothing on record to show that he has got any connection with the articles seized. No investigation was conducted to find out the connection between the third accused and the contraband articles seized. No specific question was put to him regarding this aspect also while he was

questioned under section 313 of the Code to prove that he was in conscious possession of the contraband article seized. So, under the circumstances, the court below was not justified in convicting the appellants for the offence alleged and they are entitled to get acquittal. Further, there is delay of two days in producing the article before court. The nature of seal used was not mentioned in the mahazer. The possibility of tampering cannot be ruled out. So, according to the learned counsel, appellants are entitled to get acquittal.

7. On the other hand, learned Public Prosecutor submitted that the evidence of Pws 1 and 2 will go to show that they have got prior acquaintance with the accused persons and they identified them in the light of the jeep and there is nothing to disbelieve the evidence of these witnesses in this aspect. So, under the circumstances, the court below was perfectly justified in convicting the appellants for the offences alleged.

8. The case of the prosecution in nutshell was that on 9.4.2000, at about 10.05 p.m, while PW1, the Circle Inspector of Police and PW2, the Sub Inspector of Police, Balussery were doing patrol duty and vehicle inspection duty along the public road and at about 22.05 when they reached

near Mundoth toddy shop, they saw the jeep with No.KLL 3013 coming towards Quilandy side at a high speed and PW1 wanted to stop the vehicle, but it was not stopped and it proceeded at a high speed. So they chased the jeep and after reaching Kannadipoyil, it went through a mud road and thereafter the vehicle was stopped and except the third accused, other accused persons in the vehicle abandoned the jeep and ran away from the place. Though they chased them, they could not catch hold of them. Thereafter, they came back and they examined the jeep and found MO1 series nine plastic cans of 35 litres capacity containing full of some liquid. When PW1 examined the same, he was satisfied that it was arrack. He took samples in two bottles of 375 ml each from each can and sealed the same and affixed label containing signature of himself and the witnesses. He sealed and labeled the cans also in the same fashion and seized the vehicle, MO1 series cans and the sample bottles as per Ext.P2 mahazer in the presence of PW3 and another. He arrested the third accused and prepared Ext.P3 arrest memo and conducted inspection of his body but no incriminating articles were seized from his possession. Thereafter he came to the police station along with the third

accused and the contraband articles and registered Ext.P1 First Information Report as Crime No.58/2000 of Atholi police station against five accused persons who are the appellants herein under sections 55 (a), (i) and 58 of the Abkari Act. He produced the articles before PW4. He produced the third accused before court along with the remand report. He produced articles before court along with Ext.P7 property list. He prepared Ext.P8 forwarding note to send the sample for analysis and samples were sent from court to chemical analysis laboratory and Ext.P9 chemical analysis report obtained, which shows that all the samples contained ethyl alcohol. Further investigation in this case was conducted by PW5, the Sub Inspector of Police, Atholi police station, the successor of PW4. He went to the place of occurrence and prepared Ext.P6 scene mahazar. He questioned the witnesses and recorded their statements. He completed the investigation and submitted final report.

9. PW3 is an independent witness to the seizure. Though he admitted his signature in Ext.P1, he denied having seen the seizure or arrest of any of the accused persons. He denied having stated in Ext.P5 when questioned by the investigating

officer. According to him, he signed the same from the police station. So his evidence is not helpful to prove either the identity of the accused or actual seizure of the contraband articles.

10. PW1 is the detecting officer, who was the Circle Inspector of Police, Balussery circle. According to him, on that day, he was doing patrol duty and vehicle inspection duty along with PW2, the Sub Inspector of Police attached to his office, and when they reached the place of detection, they saw the jeep in question coming at a high speed towards Quailandy side. Though he wanted to stop the same, driver of the vehicle did not stop the vehicle and it went off from the place. They chased the vehicle for some distance but the jeep was taken to a mud road and stopped them and persons in the jeep except the third accused ran away from the place abandoning the jeep. Though they chased them, they could not catch hold of them. Though PW1 had stated that he was having prior acquaintance with the accused persons, that fact was not mentioned in Ext.P1 seizure mahazer. A reading of Ext.P2 seizure mahazer will go to show that the articles abandoned were seized along with the jeep and sample was taken and presence of the third accused was

also mentioned therein. Though Pws 1 and 2 claimed that they could identify the accused from the light of the jeep, it was brought out in evidence that all the five persons were travelling in the front seat and the contraband articles were seen in the rear portion of the jeep. So there is no possibility of these persons to identify the persons, who were travelling in the jeep. They have no case that they have made enquiries about identity of the accused and thereafter they could mention their names in Ext.P1 First Information Report. PW1 had no case that it was as disclosed by the third accused that identity of other accused persons could be gathered. It is also brought out in evidence that the other accused were not arrested by the investigating officer but they surrendered before court and there is no case for the investigating officer that he obtained their custody and they were shown to the witnesses as part of the investigation. Witnesses were seeing accused 1, 2, 4 and 5 for the first time in court after the incident. Further it is brought out in evidence of Pws 1 and 2 that all the other accused persons after getting down from the jeep ran away in different directions. So under the circumstances it is not possible for the police officials to identify them in a short

period. So identity of accused 1, 2, 4 and 5 made by the witnesses from court is highly doubtful and it is not safe to rely on their evidence for the purpose of proving the identity of the accused, who ran away from the place so as to connect them with the contraband articles seized. So the court below was not justified in coming to the conclusion that the prosecution has proved beyond reasonable doubt the identity of accused 1, 2, 4 and 5 as the persons who were travelling in the vehicle and convicting them for the said offence.

11. According to the prosecution, the first accused was driving the vehicle. No particulars of his driving licence was collected as part of the investigation. Further, the owner of the jeep was not even questioned by the investigating officer to find out as to whether the first accused was travelling in the vehicle at the relevant time and the purpose for which the vehicle has been used on that day. No attempt was made on the side of the investigating officer to collect evidence on this aspect. So, under the circumstances, it cannot be said that the prosecution was able to prove beyond reasonable doubt that the first accused was driving the vehicle at the relevant time and as such, he cannot be found guilty for the offence under

sections 132 read with section 177 of the Motor Vehicles Act and Rule 150 of the Motor Vehicles Rules read with section 177 of the Motor Vehicles Act and the findings of the court below on that aspect are unsustainable in law and the same is liable to be set aside. So accused 1, 2, 4 and 5 are entitled to get acquittal of the charges levelled against them giving them the benefit of doubt.

12. As regards the third accused is concerned, the evidence of PWs1 and 2 coupled with Ext.P2 mahazer will go to show that he was arrested while he was travelling in the jeep. Further it was brought out in the evidence of Pws 1 and 2 that the third accused did not run away from the place and when the jeep was stopped, they prevented him and he was arrested from there. There is no investigation conducted by the investigating officer from where the third accused had entered in the vehicle and what was his connection with the contraband article. No question was put to him when he was questioned under section 313 of the Code that he was in conscious possession of the article said to have been transported in the vehicle and he was responsible for the transporting of the article along with other accused persons.

None of the witnesses have deposed the role of the third accused in transporting the contraband article along with other accused persons as well. Merely because the third accused was found travelling in the vehicle alone is not sufficient to come to the conclusion especially when there were other persons also travelling in the vehicle to hold that he was in conscious possession of the articles and he was responsible for transport of the contraband article found in the vehicle. Unless it is proved by the prosecution that he was in conscious possession of the article, it cannot be said that the prosecution was able to establish beyond reasonable doubt that the third accused was found to be in possession of the contraband article and he was responsible for transport of the article along with other accused persons said to have travelled in the vehicle. So under the circumstances, the finding of the court below that the prosecution has proved beyond reasonable doubt that the third accused was in conscious possession of the contraband article and he was responsible for transport of the contraband article and consequential conviction entered by the court below against the third accused for the said offence are unsustainable in law and he is entitled to get acquittal of

the charge levelled against him giving him the benefit of doubt.

13. Further, it will be seen from the evidence that though articles were seized on 9.4.2000 at 10.05 p.m, and it was produced before PW4 on the same day, but the articles were produced before court only on 11.4.2000 though First Information Report was produced and the third accused was produced before court on the next day itself. Though PW4 had stated that he was on court duty, he could not produce the article, he did not file any report before court explaining the delay in producing the articles seized. Further, though PW1 had stated that he had affixed label on the contraband article seized, such thing was not mentioned in Ext.P1 First Information Report or Ext.P2 seizure mahazer. So under the circumstances, it cannot be said that the articles have reached court in a tamper proof condition so as to come to the conclusion that 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. If this is not established beyond reasonable doubt, then it cannot be said that the prosecution was able to establish the link between the accused and the

contraband article and succeeded in bringing home the complexity of the accused in the commission of the offence and that benefit must be given to the accused.

14. In view of the discussions made above, the finding of the court below that the prosecution has proved beyond reasonable doubt that the accused have committed the offence of transporting arrack and first accused was driving the vehicle and he did not stop the vehicle and thereby the accused persons have committed the offence punishable under section 55(a), (i) and 58 of the Abkari Act and section 132 read with section 177 of the Motor Vehicles Act and Rule 150 read with section 177 of the Motor Vehicles Act and Rules are unsustainable in law and they are entitled get acquittal of the charges levelled against them giving them the benefit of doubt. In view of the finding that the appellants are entitled to get acquittal, the sentence imposed is not proper and the same is also liable to be set aside.

In the result, the appellants succeed and the appeal is allowed. The order of conviction and sentence passed by the court below against the appellants under sections 55(a), (i) and 58 of the Abkari Act and section 132 read with section 177 of

the Motor Vehicles Act and Rule 150 read with section 177 of the Motor Vehicles Act are hereby set aside. The appellants are acquitted of the charge levelled against them giving them the benefit of doubt. They are set at liberty. The bail bonds executed by them will stand cancelled. The court below is directed to refund the fine amount, if any, remitted by the appellants to them if their making necessary application in that regard.

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

Sd/-

K. RAMAKRISHNAN, JUDGE.

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/true copy/

P.S to Judge