

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

THURSDAY, THE 12TH DAY OF NOVEMBER 2015/21ST KARTHIKA, 1937

CRL.A.No. 838 of 2004 ()

**AGAINST THE JUDGMENT IN SC 425/2001 of ADDL. DISTRICT & SESSIONS COURT,
VADAKARA DATED 30-04-2004**

APPELLANT(S)/IST ACCUSED.:

**MANY, S/O RADHAKRISHNA KURUP,
KINARULLATHIL HOUSE, AYANCHERY**

**BY ADVS.SRI.LIFFY P. FRANCIS
SRI.K.B.PRADEEP, LEGAL AID COUNSEL (BY ORDER)**

RESPONDENT/COMPLAINANT.:

**STATE OF KERALA, REPRESENTED BY THE
CIRCLE INSPECTOR OF EXCISE RANGE, VADAKARA
THROUGH THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA
ERNAKULAM.**

BY SRI JIBU.P.THOMAS, PUBLIC PROSECUTOR

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 12-11-2015, THE COURT
ON THE SAME DAY DELIVERED THE FOLLOWING:**

K. RAMAKRISHNAN, J.

Crl. Appeal No.838 of 2004

Dated this the 12th day of November, 2015

JUDGMENT

First accused in S.C. No.425/2001 on the files of the the Additional District and Sessions Court, Vadakara is the appellant herein. The appellant alongwith another person was charge-sheeted by the Excise Inspector of Vadakara Excise Range under Section 55(a) of the Abkari Act and Rule 9 of the Foreign Liquor Rules.

2. The case of the prosecution in nutshell was that on 28.01.1998, at about 7.30 pm, 2nd accused being the driver of autorikshaw bearing registration No.KL-11/B-4241 and 1st accused being the passenger in the autorikshaw transported 48 bottles of Indian made foreign liquor of 180 ml each from Mahe to Vadakara through the National Highway in autorikshaw No.KL-11/B-4241 in violation of the provisions of Abkari Act and thereby they have committed the aforesaid offence.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court, Vadakara and it was

committed to the Sessions Court by the learned Magistrate under Section 209 of the Code of Criminal Procedure. After committal, the Sessions Court, Kozhikode took the cognizance of the case as S.C. No.425/2001 and the case was originally made over to the Assistant Sessions Court, Vadakara for disposal. Thereafter, the case was withdrawn by the Sessions Judge and made over to Additional Sessions Court, Vadakara for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under Section 55(a) of Abkari Act was framed and the same was read over and explained to them and they pleaded not guilty. In order to prove the case of the prosecution, PWs. 1 to 6 were examined and Exts.P1 to P11, P2(a), P2(b) and P3(a) were marked on the side of the prosecution and MOs. 1 series and MO.2 were marked on their side. After closure of the prosecution evidence, the accused were questioned under Section 313 of the Code of Criminal Procedure and they denied all the incriminating circumstances brought against them in the prosecution evidence. They have further stated that there was some incident occurred in Hotel Queens Bar, Vadakara in respect of the quality of food supplied which was questioned by the 1st accused and on account of that enmity, at the instigation of the bar owner, they have been

falsely implicated in the case. He was not travelling in the vehicle and no article was seized from their possession. Since the evidence in this case did not warrant an acquittal under Section 232 of the Criminal Procedure Code, the accused were called upon to enter on their defence. One witness was examined as DW-1 and Ext.D1 was marked on their side. After considering the evidence on record, the court below found the 2nd accused not guilty of the offence alleged and he was acquitted of the charge levelled against him giving the benefit of doubt under Section 235(1) of the Code of Criminal Procedure. But the court below found the 1st accused guilty under Section 55(a) of Abkari Act and convicted him thereunder and sentenced him to undergo simple imprisonment for three years and also to pay a fine of Rupees One lakh in default to undergo simple imprisonment for one year more. Set off was allowed for the period of detention already undergone under Section 428 of the Code of Criminal Procedure. Aggrieved by the same, the present appeal has been preferred by the appellant-first accused before the court below.

5. Since the counsel who filed the appeal did not appear, this Court appointed Sri K.B.Pradeep, Advocate, Ernakulam as Legal Aid Counsel. Heard the Legal Aid Counsel Sri K.B.Pradeep

appearing for the appellant and Sri Jibu P.Thomas, learned Public Prosecutor appearing for the State.

6. The Legal Aid Counsel argued that the independent witnesses to seizure turned hostile and except the interest of testimony of the official witnesses, there is no other evidence to prove the seizure. Having acquitted the 2nd accused disbelieving the case of the prosecution, the same benefit ought to have been given to the 1st accused as well. Even assuming that the entire case of the prosecution is admitted, he was only a passenger in the vehicle, it cannot be said that he was in conscious possession of the article. Further, the bottles were not properly sealed and labelled before it was produced before court. The specimen seal impression of the seal was not provided. Though the seizure was on 28.01.1998, the articles were produced before the court only on 31.01.1998 and there is no report submitted before the court for the delay in producing the article though the accused was produced before the learned Magistrate on the same date. So under the circumstances, the court below was not justified in convicting the appellant for the offences alleged and he is entitled to get acquittal.

7. On the other hand, the learned Public Prosecutor submitted that there was no delay in producing the article and

delay has been explained by the person who produced the article before court. Further, the evidence of PWs. 3 and 4 will go to show that the appellant was arrested alongwith the contraband articles and there is nothing to disbelieve the evidence of the prosecution witnesses in this regard. So 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 28.01.1998, at about 7.30 pm, PW-3, the Preventive Officer attached to the Excise Circle Office, Vadakara and PW-5 another preventing officer of the same office were doing patrol duty aongwith other excise officials and they got information that Indian made foreign liquor was being transported from Mahe in autorikshaw with No.KL-11/B-4241. Immediately he sent a search memo to court and thereafter he went to the place and when he reached in front of Sagar College located in Ooralungal, they saw the autorikshaw coming from Mahe side and they wanted to stop the same. But the autorikshaw did not stop. It proceeded further. They chased and stopped the same. Thereafter, they examined the vehicle and found that the 2nd accused was driving the vehicle and the 1st accused was sitting in the vehicle holding a cardboard box

between his legs. On examination of the cardboard box, they found that it contained 48 bottles of 180 ml of Indian made foreign liquor. He took one of the bottles and opened the same and examined the contents of the same and satisfied that it was Indian made foreign liquor. The bottles did not contain the sticker of the Kerala State Beverages Corporation. The accused were not having any documents with their possession as well. So, he took the opened bottle as sample and sealed the same and affixed label containing the signature of himself and the witnesses. He seized the autorikshaw and the articles after preparing Ext.P6 search list and seized the articles as per Ext.P7 mahazar in the presence of PWs.1 and 2. He arrested both the accused and prepared Exts.P4 and P5 arrest memos. Thereafter, he came to Circle Office and registered Ext.P7 crime and occurrence report as O.R.No.1/1998 against the accused under Section 55(a) of Abkari Act. He produced the accused before the court on the same day and he was remanded to custody. He kept the articles in his custody and produced the same before PW-4, the Excise Inspector attached to Vadakara Excise Range within whose jurisdiction the incident occurred. He registered Ext.P8 crime and occurrence report as C.R.No.2/1998 of Vadakara Excise Range against the accused.

He prepared Ext.P9 property list and produced the articles before court on 31.01.1998. He sent Ext.P10 forwarding note to court with a requisition for sending sample for analysis and sample was sent from court and Ext.P11 chemical report was obtained. The investigation of this case was conducted by PW-6. He questioned the witnesses and recorded their statements. He collected Ext.P11 chemical report and produced the same before court. He completed the investigation and submitted final report.

9. PWs.1 and 2 are the independent witnesses of seizure. Though PW-1 had admitted his signature in Ext.P1, he denied having seen the seizure. PW-2 had denied the seizure as well as the signature in Ext.P1. But a reading of their evidence will go to show that they were present at that place when the autorikshaw was seized alongwith some bottles said to be Indian made foreign liquor.

10. Further, it will be seen from the evidence of PW-3 that he arrested the appellant alongwith the contraband articles alongwith a cardboard box containing 48 bottles of liquor said to be Indian made foreign liquor. He took one bottle as sample and satisfied that it was Indian made foreign liquor. The evidence of PW-3 was corroborated by PW-5, the Preventive Officer who

accompanied him. Though they were cross-examined at length, nothing was brought out to discredit their evidence on this aspect. Further, they denied the suggestion that the 1st accused was taken from Queens Bar Hotel at Vadakara, at the instance of the bar owner as he had made complaint about the quality of the food supplied from the Bar. In order to prove his case, DW-1 was examined, but his evidence is not sufficient to prove the case of the accused. So court below was perfectly justified in rejecting the evidence of DW-1 on those aspect. Ext.D1 was produced to prove that there was no seizure as claimed. But the entries in Ext.D1 will go to show that the autorikshaw was seized on that day. So from the circumstances and also on the basis of evidence, the court below was perfectly justified in coming to the conclusion that the appellant was arrested from the autorikshaw said to be containing MO.2 cardboard box with MO.3 bottles while he was travelling in the autorikshaw mentioned above.

11. It is settled law that merely because some articles were seized from the possession of the accused is not sufficient to prove the case of the prosecution to convict the accused for the offences alleged. It must be further proved by the prosecution that the articles reached the court in the same condition in which it was seized without any tampering and the

chemical analysis report relates to the representative sample said to be taken from the contraband articles alleged to have been seized from the possession of the accused. In this case, PW-3 had no case that he had produced the articles before court though he had produced the accused on the same day before the Magistrate and he was remanded to custody. He had admitted that he did not affix seal or label on the remaining bottles and no label containing the signatures of the witnesses and the accused was affixed on MO.2 cardboard box. He did not mention the nature of seal used by him for sealing the sample bottle. He did not provide the specimen impression of the seal used for sealing the sample bottle as well for the identification of the court that it was reached the court in a tamper free condition. According to him, he produced the articles before PW4 on the next day. Though PW-4 had registered Ext.P8 occurrence report on the basis of the documents produced on 29.01.1998, he had prepared the property list only on 31.01.1998. There is no explanation forthcoming from the side of PW-4 for the delay in preparing the property list though the articles were produced before him on 29.01.1998 itself. Further, articles were produced before the court alongwith Ext.P9 property list on 31.01.1998 though PW-4 had a case that since 29.01.1998 and 30.01.1998

were being holidays, he produced the same on the next working day. He could have produced the articles before the Magistrate and get the endorsement to produce the same on the next working day before the court which he had not done. But no report has been filed before the court for delay in producing the article. Further, it is seen from Ext.P10 forwarding note in the space provided for sample seal, the specimen seal used for sealing the bottle was not provided. On the other hand, what was provided is the sample seal of the court and it was that sample seal that was verified in the lab and found to be in tact. So under the circumstances, it cannot be said that the articles were produced before court in a tamper free condition so as to come to the conclusion that the chemical analysis report relates to the representative samples said to have been taken from the contraband articles alleged to have been seized from the possession of the accused. If the prosecution fails to prove that the articles reached the court in a tamper condition and the chemical analysis report relates to the representative samples said to have been taken from the contraband seized from the possession of the accused, it cannot be said that the link between the accused and the contraband articles and prosecution succeeded in bringing the complicity of the accused and the

benefit must be given to the accused. It was so held in the decision reported in **Ravi v. State of Kerala [2011 (3) KHC 121]**. These aspects were not properly considered by the court below before coming to the conclusion that the prosecution has proved the case against the accused beyond reasonable doubt and the articles were produced before court in a tamper free condition and Ext.P11 chemical report relates to the representative samples said to have been taken from the contraband articles alleged to be seized from the possession of the accused and consequential conviction entered by the court below against the appellant on that basis 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. Since this Court found 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 Abkari Act are hereby set aside. Appellant is acquitted of the charge levelled against him giving the benefit of doubt. He is set at liberty. The bail bond executed by him will stand 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.

This Court places appreciation on record for the manner in which Sri K.B.Pradeep, Legal Aid Counsel appointed for the appellant argued the case and the interest shown by him in effectively arguing the case for the appellant.

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

SD/-
K. RAMAKRISHNAN,
JUDGE

JV