

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. 951 of 2004 ()

AGAINST THE JUDGMENT IN SC 1705/2002 of III ADDL.SESIONS COURT,
KOLLAM, DATED 18-05-2004

&

AGAINST THE ORDER/JUDGMENT IN CP.195/2001 of J.M.F.C., KARUNAGAPPALLY.

APPELLANT(S) /ACCUSED:

SURENDRAN, S/O.SANKARANKUTTY,
MUNDAKATHIL PUTHEN VEEDU, KOTTAKKAPPURAM MURI,
KULASEKHARAPURAM VILLAGE, KARUNAGAPPALLY TALUK.

BY ADV. SRI.A.N.RAJAN BABU

RESPONDENT(S) /COMPLAINANT:

STATE-REPRESENTED BY THE INSPECTOR OF
EXCISE, KARUNAGAPPALLY.

BY PUBLIC PROSECUTOR SRI.JIBU P.THOMAS

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

SS

K. RAMAKRISHNAN, J.

.....
Crl. Appeal No.951 of 2004
.....

Dated this the 13th day of November, 2015

J U D G M E N T

Accused in S.C.No.1705/2002 on the file of the IIIrd Additional Sessions Court, Kollam, is the appellant herein. The appellant was charge-sheeted by the Excise Inspector, Karunagappally Excise Range in Crime No.81/2000 of that excise range under Section 8(1) and (2) and Section 55(a) of Abkari Act.

2. The case of the prosecution in nut shell was that, on 09.07.2000 at about 9.00 p.m., on the northern side of Keveni bridge on the southern side of Vallikkavu junction-Vallikkavu Boat jetty road in Kulasekharapuram village of Karunagappally Taluk, the accused was found transitting 5 liters of arrack in violation of the provisions of Abkari Act and thereby he had committed the offence punishable under Section 55(a) of the Kerala Abkari Act (ought to be under Section 8(1) and (2) of the Abkari Act).

3. After investigation, final report was filed before the Judicial First Class Magistrate Court, Karunagappally, where it was taken on file as C.P.No.195/2001. Thereafter it was committed to the Sessions Court, Kollam by the learned magistrate under Section 209 of the Code of Criminal Procedure (hereinafter called the Code). After committal, the Sessions Court had taken cognizance of the case as S.C.No.1705/2002 and it was made over to IIIrd Additional Sessions Court, Kollam, for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under Section 55(a) of Abkari Act (ought to be under Section 8(1) of the Abkari Act) was framed and the same was read over and explained to him and he pleaded not guilty. In order to prove the case of the prosecution, PWs 1 to 6 were examined and Exts.P1 to P3 and MO1 were marked on the side of the prosecution. 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, no contraband article was seized from his possession 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 of Criminal Procedure, the Additional Sessions Judge directed the accused 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 55(a) and (i) of the Abkari Act and convicted him thereunder and sentenced him to undergo rigorous imprisonment for three years and also to pay a fine of ₹1,00,000/-, in default to undergo rigorous imprisonment for ten months under Section 55(a) of the Abkari Act. Aggrieved by the same, the present appeal has been preferred by the appellant/ accused before the court below.

5. Heard Sri.A.N. Rajan Babu, counsel appearing for the appellant and Sri.Jibu P.Thomas, learned Public Prosecutor appearing for the State.

6. The counsel for the appellant submitted that, independent witnesses to the seizure namely PWs 3 and 6 did not support the case of the prosecution. Further there was a delay of three days in producing the article and there is nothing on record to show that the same article said to have been seized were produced in court. Further there was no spot sample taken and there is no evidence to show from where, when and who had taken the sample and none of the witnesses has spoken about the same as well. So under the circumstances, it cannot be said that the prosecution has proved the link between the accused and the contraband articles and the chemical analysis report relates to the representative sample said to have been taken from the contraband articles alleged to have been seized from the possession of the accused. So the court below was not

justified in convicting the appellant for the offence alleged and he is entitled to get acquittal.

7. On the other hand, learned Public Prosecutor submitted that the articles were produced before the magistrate on the next day itself and as directed by the magistrate it was produced before the court on 12.07.2000 and it was taken back after taking sample from court and the sample was sent from the court and as such the finding of the court below is perfectly justifiable and that does not call for any interference.

8. The case of the prosecution as emerged from the prosecution witnesses was that, PW1 the Excise Circle Inspector of Karunagappally Range, along with PW2 another excise officer were doing patrol duty and when they reached near the place of occurrence, they saw the accused coming with MO1 kannas in his hand and on seeing the excise party, he tried to go away from the place. So he stopped him and verified the contents of the kannas, which

contained five liters of some liquid and on further examination by smelling and tasting, he was satisfied that it was arrack. Thereafter he sealed the cannas and affixed label and seized the same as per Ext.P1 mahazar in the presence of PWs 3 and 6 and thereafter he came to Excise Office and produced the same sample before PW4, the excise inspector of Kanuranagappally Excise Range. He registered Ext.P2 crime and occurrence report as crime No.81/2000 of Karunagappally Excise Range against the accused under Section 8(1) and 55(a) of Abkari Act. Thereafter he produced the accused along with the contraband article before the magistrate and the accused was remanded to custody and the contraband articles were directed to be produced before the court on 12.07.2000 and accordingly he had produced the same on that day and after taking sample, it was returned to them. Thereafter on the basis of the requisition given, the sample taken was sent for chemical examination and Ext.P3 chemical analysis report

obtained. The investigation in this case was conducted by PW5. He questioned the witnesses and recorded their statements. He collected the chemical analysis report and completed the investigation and submitted final report.

9. PWs 3 and 6 are independent witnesses to the seizure. PW3 denied the signature in Ext.P1, but he had signed a blank white paper as requested by the excise officials during night near Vallikkavu Boat Jetty Junction. He had stated that he knew the accused. He had also denied having seen the seizure and arrest of the accused. PW6 had admitted the signature in Ext.P1 and he had also admitted that he had signed from Vallikkavu Boat Jetty Junction and he had seen the accused along with the excise officials at that time. But he denied seen the arrest of the accused or seizure of any contraband article from his possession. He had also admitted that he knew the accused. So it is clear from their evidence that they are now trying to help the accused that was the reason why they are not

supporting the case of the prosecution.

10. Then the evidence available to prove the seizure and arrest is that of PWs 1 and 2 officials witnesses. PW1 the Excise Circle Inspector and the detecting officer and PW2 the excise inspector who accompanied him on that day as part of the patrol duty. PW1 had stated that on that day while they were doing patrol duty and at about 9.00 p.m., when they reached the place of occurrence, they saw the accused coming with MO1 kannas in his hand and on seeing the excise party, he tried to go away from the place and they stopped him and on verification of the kannas, he found that it contained 5 liters of some liquid which on further examination he was satisfied that it was arrack. He sealed the same and affixed the label containing the signature himself, accused and the witnesses and seized the same as per Ext.P1 mahazar and thereafter came to excise office and produced the same before the excise inspector. He had arrested the accused and prepared arrest memo.

The evidence of PW1 was corroborated by PW2. Though they were cross examined at length nothing was brought out to discredit their evidence on this aspect. So under the circumstances, court below was perfectly justified in coming to the conclusion that the accused was arrested along with MO1 kannas said to be containing arrack.

11. Mere seizure of the kannas 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 were produced before court in tamper free condition and the 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. In this case, admittedly no spot sample was taken. PW1 did not state anything about the sample taken. PW4 had stated that he had produced the article before the magistrate on 10.07.2000 and the magistrate has directed to produce the same before court

on 12.07.2000 and thereafter on 12.07.2000, he produced the same before court and it was received in court and thereafter returned him after taking sample. But he did not mention as to when the sample was taken, who had taken the sample etc., The Thondy clerk or the person who had drawn the sample and sent the sample for chemical analysis was not examined before the court to prove that the sample was properly drawn from the contraband article seized from the possession of the accused and it had reached the chemical examiner in a tamper free condition. Similar situation was considered by this court in the decision reported in **Sasidharan v State of Kerala (2007(1) KLT 720)** where this court has observed as follows:

"Prosecution has a duty to prove that it was the sample taken from the contraband liquor seized from the possession of the accused which had reached the hands of the Chemical Examiner in a fool proof condition. Without the link evidence of actual sampling by the concerned clerk of the court by drawing sample from the can and sending the same in a sealed packet to the Chemical Examiner with a specimen seal sent separately for 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 the hands of the Chemical Examiner in a fool proof condition".

In the same decision it has been observed that"

"Committing Magistrate 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 Judges 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 of the Magistrate is examined before court during trial. The Public Prosecutor in charge of the case also had a duty to file an additional witness-list for examining the thondy section clerk (property clerk) concerned so as to establish the nexus between the contraband substance and the accused"

12. In that case the court below found that non-examination of the thondy clerk who had drawn the sample is fatal and in such circumstances, it cannot be said that prosecution has proved the link between the accused and the contraband article and brought home the complexity of the accused in the commission of the crime and that benefit was given and he was acquitted.

13. In this case also there is no evidence adduced on the side of the prosecution to prove when, from where and who had taken the sample and when it was sent from court, who had taken the sample to the chemical examiner's laboratory etc. The same view has been

reiterated in the decision reported in **Nalinakshan v. State of Kerala (2012 (4) KHC 464)**. These aspects were not considered by the court below before coming to the conclusion that prosecution has proved the case against the accused beyond reasonable doubt and consequential conviction entered by the court below in view of the discussion made above is unsustainable in law and the same is liable to be set aside. The appellant is entitled to get acquittal of the charge leveled against him giving him the benefit of doubt.

14. In view of the finding of this court that, the appellant is entitled to get acquittal, the sentence imposed is also not proper and the same is also liable to be set aside.

In the result, the appellant succeeds and the appeal is allowed and the order of conviction and sentence passed by the court below against the appellant under Section 55(a) of the Abkari Act (ought to have been under Section 8(1) of the Abkari Act) are hereby set aside and the

appellant is acquitted of the charge leveled against him giving him 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 on making necessary application for that purpose.

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

Sd/-

K. RAMAKRISHNAN, (Judge)

// True Copy//

P.A. to Judge

ss