

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 9TH DAY OF NOVEMBER 2015/18TH KARTHIKA, 1937

CRL.A.No.960 of 2004 ()

AGAINST THE JUDGMENT IN SC 277/2001 of ADDITIONAL DISTRICT & sessions
COURT (ADHOC-i), MANJERI, DATED 09-06-2004

APPELLANT(S)/ACCUSED:

CHERIYANI @ NARAYANAN, S/O.AYYAPPAN,
EDAKKARA AMSOM UTHIRAKULAM DESOM, NILAMBUR TALUK,
MALAPPURAM (DT) .

BY ADV. SRI.T.K.AJITH KUMAR

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA REPRESENTED BY THE
EXCISE INSPECTOR, NILAMBUR RANGE, MALAPPURAM DT.,
BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

PUBLIC PROSECUTOR SMT. SEENA RAMAKRISHNAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 09-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SS

K. RAMAKRISHNAN, J.

Crl. Appeal No.960 of 2004

Dated this the 9th day of November, 2015

JUDGMENT

Accused in S.C.No.277/2001 on the file of the Additional Sessions Court (Ad-Hoc-I), Manjeri, is the appellant herein. The appellant was charge-sheeted by the Excise Inspector, Nilamboor Excise Range in Crime No.28/1999 of that Excise range under Section 55(a) of Abkari Act (ought to be under Section 8(1) and (2) of the Kerala Abkari Act).

2. The case of the prosecution in nut shell was that, on 16.08.1999 at about 05.00 p.m., the accused was found to be in possession of 3 liters of arrack in a five liter can and found transitting the same along with the foot path leading to Kodalipoyil in violation of the Provisions of Abkari Act and thereby he had committed the offence punishable under Section 55(a) of Abkari Act (ought to be under Section 8(1) and (2) of the Kerala Abkari Act).

3. After investigation, final report was filed

before the Judicial First Class Magistrate Court, Nilamboor, where it was taken on file as C.P.No.3/2001, thereafter it was committed to the Sessions Court, Manjeri, by the learned magistrate under Section 209 of the Code of Criminal Procedure. After committal, the learned Sessions Judge took cognizance of the case as S.C.No.277/2001. Thereafter the case was made over to Additional Sessions Court (Ad-Hoc-I), Manjeri, 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 (ought to be under Section 8(1) and (2) of Abkari Act) 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 5 were examined and Exts.P1 to P6 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 and he had further stated that, no article was seized from his possession. He had taken by the exercise officials from his house 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. DW1 was examined on the side to prove his case. After considering the evidence on record, the court below found the appellant guilty under Section 55(a) 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 one year more. Set off was allowed for the period of detention already undergone by him in this case under Section 428 of the Code of Criminal Procedure. Aggrieved by the same, the present appeal has been preferred by the

appellant/ accused before the court below.

5. Heard Sri. T.K.Ajith Kumar, counsel appearing for the appellant and Smt. Seena Ramakrishnan, learned Public Prosecutor appearing for the State.

6. The counsel for the appellant submitted that, there was delay in producing the article, which has not been explained. Further there was tampering of the article before it was produced. There is contradiction regarding the affixture of label between PWs 1 and 2 and PW4. There was cellophane tape affixed on the label, which according to PW1 was not affixed by him, but according to PW2 it was done from the place of occurrence. According to PW4 the Excise Inspector who registered the crime, when it was produced before him it was not having any sticker. But it was later affixed. He did not know who had done the same. So it cannot be said that the article was produced before court without tampering. Further the specimen seal impression was not produced before court; even the

forwarding note does not contain the specimen seal impression. So there is no possibility for the court to verify the genuineness of the article produced. So according to him the learned Additional Sessions Judge 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 there was no delay in producing the article and there was no possibility of tampering as contended by the counsel for the appellant. Court below had considered this aspect elaborately and came to the conclusion that the prosecution has proved the case against the accused beyond reasonable doubt.

8. The case of the prosecution in nut shell was that, on 16.08.1999, at about 05.00 p.m., PW1 excise inspector attached to Nilamboor Excise Range was doing patrol duty along with PW2, the preventive officer and when they reached the place of occurrence, they saw the accused

coming with MO1 cannas in his hand and on seeing the excise party, he tried to go away from that place. So he stopped him. PW1 examined the contents of the cannas and found that it contained 3 liters of some liquid and on verification by smelling and tasting, he was satisfied that it was arrack. He had taken sample from the liquid and sealed and labeled the same and affixed the label containing the signature of himself, accused and the witnesses. He had sealed and labeled MO1 cannas also in the same fashion and seized the same as per Ext.P1 mahazar in the presence of PWs 3 and another. Thereafter he arrested the accused and prepared Ext.P1 arrest memo and gave intimation regarding his arrest to his wife. Thereafter he came to excise office and entrusted the articles and the accused to PW4, who registered Ext.P3 occurrence report as Crime No.28/1999 of Nilamboor Excise Range against the accused under Section 8(1) of Abkari Act. The crime was registered on 17.08.1999. He prepared Ext.P4 thondy list and

produced the same before court along with the contraband article seized. He produced the accused along with remand report. He sent Ext.P5 forwarding note with request to send the sample for chemical analysis and the sample was sent from court to chemical examiners laboratory and Ext.P6 chemical analysis report was obtained. Further investigation in this case was conducted by PW5, who questioned the witnesses and recorded their statements. He collected Ext.P6 chemical analysis report and produces the same before court. He completed the investigation and submitted final report.

9. PW 3 is an eye witnesses to the incident. Though he admitted the signature in Ext.P1 and P2 mahazar, he denied having seen the arrest and seizure of the contraband article from the possession of the accused. According to him, he knew the accused and he signed the documents as requested by the excise officials. So it is clear from the evidence that he is now trying to help the accused

and that was the reason why he is not supporting the case of the prosecution.

10. Then the evidence available is that of PWs 1 and 2, who are the official witnesses examined on the side of the prosecution. PW1 is the detecting officer and PW2 is the accompanying officer. PW1 had categorically stated that on that day, while he was doing patrol duty along with PW2, when they reached the place of occurrence, they saw the accused coming with MO1 kannas and on seeing the excise party, he tried to go away from that place. So they stopped him and on examination of the kannas, it was revealed that it contained 3 liters of some liquid, which on further examination, he was satisfied that it was arrack. Thereafter he took sample and sealed the sample bottle and affixed label containing the signature of himself, accused and the witnesses. He sealed MO1 kannas and labeled the same in the same fashion and arrested the accused and seized the articles as per Ext.P1 mahazar. He came to

Excise office and entrusted the accused, contraband articles and the documents prepared to the Excise Inspector. The evidence of PW1 on this aspect was corroborated by the evidence of PW2. DW1 was examined on the side of the accused to prove that he was not arrested from the spot. But it was brought out in the evidence of DW1 that he is a close friend of the accused and his tea shop was inaugurated on that day and he was busy with the inaugural function and he came to the court as requested by the accused even without the summons. So all these things will go to show that he has been examined on the side of the accused to prove his case and he came to court to help the accused and so considering the circumstances, court below was perfectly justified in rejecting the evidence of DW1 as unbelievable.

11. It is settled law that merely because independent witnesses to the seizure did not support the case of the prosecution is not a ground to disbelieve the

prosecution case as such. Court can rely on the evidence of official witnesses, if it is believable and trustworthy and base conviction on that basis. In this case PW1 and PW2 were cross examined at length, but nothing was brought out to discredit their evidence regarding the arrest of the accused and seizure of the kannas said to be containing arrack and finding of the court to that effect is perfectly justifiable.

12. It is also settled law that mere proof of seizure of the kannas with some liquid is not sufficient to convict the accused for the offence alleged. It is for the prosecution to prove the link between the contraband article seized with the accused and it has to be further proved that the article reached from the court in a tamper free condition and the chemical analysis report relates to the representative sample said to have been taken from the contraband article seized from the possession of the accused.

13. In this case, there is some discrepancy regarding the manner in which the sample was taken. It was spoken to PW1 that he had affixed his personal seal and also affixed label containing the signature of himself, accused and the witnesses. He did not put the Crime No. and he had not laminated the label by affixing any cellophane tape as seen in MO1 cannas. He had also stated that he did not know who had done the same as well. But according to PW2, the cellophane tape was affixed from the place of detection itself, before it was produced before the excise inspector. Further according to him the Crime No. was also written from the spot, which was denied by PW1. The evidence of PW4 will go to show that at the time when MO1 cannas was produced before him, there was no lamination as seen on the label from court. He had also stated that he did not know who had done the same. He had also stated that he did not write the Case No. on the label. If that be the case, it could have been done only after

it was entrusted to the official who had taken the same to court. The assumption of the court below that it should have been done in order to protect the label cannot be accepted without any evidence. It is for the person who had done the same to prove this fact. There was contradictory evidence regarding these aspect. So there is some force in the submission made by the counsel for the appellant that the possibility of tampering the article before it was produced in court cannot be ruled out.

14. Further it will be seen from the evidence of PW1 that he had not produced the specimen seal impression of the seal used for sealing the sample. PW4 also had no case that he had produced the specimen seal impression to the court. It is seen from Ext.P5 forwarding note that in the place where specimen seal impression will have to be provided, what is provided is the seal of the court and not the personal seal of PW1, which is said to have been used for the purpose of sealing the article. So this also will

go to show that it cannot be said that prosecution has proved beyond reasonable doubt that the sample has reached the court and the chemical analysis lab in a tamper proof condition so as to come to the conclusion that the chemical analysis report relates to the sample said to have been taken from the article alleged to have been seized from the possession of the accused. In the absence of such evidence, it cannot be said that the prosecution has proved the case beyond reasonable doubt that the accused had committed the offence and the finding of the court below on this aspect is unsustainable in law and the same is liable to be set aside and the appellant is entitled to get acquittal of the charge leveled against him giving him the benefit of doubt. Since this court has found that 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. 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 lower court is directed to refund the fine amount, if any remitted by him to him on making necessary application for that purpose before that court.

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

Sd/-
K. Ramakrishnan, Judge

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P.A. to Judge