

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

TUESDAY, THE 24TH DAY OF NOVEMBER 2015/3RD AGRAHAYANA, 1937

CRL.A.No. 1000 of 2004 (A)

SC 224/2001 of ADDITIONAL DISTRICT COURT FAST TRACK (ADHOC), MANJERI

APPELLANT(S)/ACCUSED.:

NARAYANAN, S/O.CHANDU, KALPALLI
HOUSE, KOLAKKATTIRI, THIRUVALI AMSOM
NILAMBUR TALUK.

BY ADV. SRI.M.K.CHANDRA MOHANDAS

RESPONDENT(S)/STATE/COMPLAINANT.:

STATE OF KERALA, REP. BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM
KOCHI 682 031.

BY PUBLIC PROSECUTOR SRI. JIBU P. THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 24-11-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SKV

K.RAMAKRISHNAN, J

Crl.Appeal No.1000 OF 2004

Dated this the 24th day of November, 2015

JUDGMENT

Accused in SC 224/2001 on the file of the Additional Sessions Court Fast Track No.I, Manjeri is the appellant herein. The appellant was charge sheeted by the Excise Inspector, Manjeri Excise Range in CR No.10/1998 of that Excise Range under Section 55(a) of the Abkari Act (ought to be under Section 8(1) of the Abkari Act).

2. The case of the prosecution in nutshell was that on 2.7.1998, at about 6.10 pm, the accused was found to be in possession of 2 litres of illicit arrack in 2 ½ litres capacity can at Kolakkathiri and found transitting the same through the public place in violation of the provisions of the Abkari Act and thereby he had committed the offence punishable under Section 55(a) of the Abkari Act (ought to be under Section 8(1) of the Abkari Act). After investigation, final report was filed

before the Judicial First Class Magistrate Court, Manjeri, where it was taken on file as CP No.17/2001. After complying with the formalities, the learned Magistrate committed the case to the Sessions Court Manjeri. After Committal, the learned Sessions Judge took cognizance of the case as SC No.224/2001 and made over the case to Additional Sessions Court, (Adhoc-I) Manjeri for disposal.

3. When the accused appeared before the court below, after hearing both sides, charge under Section 55 (a) of the 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 P8 and MO1 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 been taken from his Tea shop and

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 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) 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 Rs.1,00,000/- in default to undergo simple imprisonment for one year more. Aggrieved by the same, the present appeal has been preferred by the appellant/accused before the court below.

4. Heard Shri.Sakthi Prakash counsel representing Shri M.K.Chndramohan Das, counsel for the appellant and Shri. Jibu P. Thomas learned Public Prosecutor appearing for the State.

5. The counsel for the appellant submitted that there was no sample seal provided and the evidence of PW1 will go to show that he had not handed over the

sample seal or specimen seal impression for the purpose of identification of the sample to the satisfaction of the court. So it cannot be said that the article reached the court in tamper proof condition. Further there is a discrepancy in the evidence of PW1 and the investigating officer regarding the quantity of contraband seized which also created doubt regarding the prosecution. Though it is mentioned in the evidence and also in Ext.P2 mahazar that label was affixed and the property list does not show the presence of label. These aspects were not considered by the court below. So the accused is entitled to get acquittal.

6. On the other hand, learned Public Prosecutor submitted that there was no delay in producing the article and the chemical analysis report shows that the seal on the bottle tallied with the specimen seal provided. So there is no illegality committed according to the court below and the order of conviction does not call for any interference.

7. The case of the prosecution as emerged from the prosecution witnesses was as follows:-

On 2.7.1998, at about 6.10pm, while PW1 the Preventive Officer attached to the Manjeri Excise Range was doing patrol duty along with PW2 and others and when they reached the place of occurrence viz., Jyothigiri Estate Road from Kolakkatteri, they saw the accused coming with MO1 kannas in his hand. On seeing the Excise party, he tried to go away from the place. So he stopped him and verified the contents of the kannas and found that it contained two litres of some liquid which on further examination he was satisfied that it was arrack. He took the sample of 370 ml from that liquid and sealed the same and affixed the label containing the signatures of himself and witnesses and the accused. He sealed the kannas and labelled the same also in the same fashion and thereafter seized the same as per Ext.P2 mahazar in the presence of PWs 3 and 4. He arrested the accused and prepared Ext.P1 arrest memo and gave arrest

intimation to his son who came there at that time. Thereafter he came to Excise Office along with the accused and the contraband article seized and entrusted the same to PW5 the Excise Inspector who registered Ext.P5 crime and occurrence report as CR No.10/1998 of Manjeri Excise Range under Section 55(a) of the Abkari Act read with Section 8(1) of the Abkari Act. He prepared Ext.P7 property list and produced the articles before court. He had produced the accused along with remand report. He sent Ext.P6 forwarding note with request to send the sample for analysis and sample was sent from court and Ext.P8 report obtained which shows that the sample contained 44.04% by volume of ethyl alcohol. The investigation in this case was conducted by PW6. He questioned the witnesses and recorded their statements. He collected Ext.P8 chemical analysis report and completed the investigation and submitted final report.

8. PWs 3 and 4 are independent witnesses to seizure, but they did not support the case of the

prosecution though they admitted that they knew the accused and according to them he was conducting a Tea Shop and it was from there the accused was taken to custody. So it is clear from their evidence that they were trying to help the accused and that was the reason why they were not supporting the case of the prosecution.

9. Then the evidence available is that of PW1 the detecting officer and PW2 the Excise Guard. PW1 had stated while he was doing patrol duty, on that day at about 6.10 am along with PW2 and another and when they reached the Jyothigiri Estate Road, they saw the accused coming with MO1 kannas which is having a capacity of 2 ½ litres. In the evidence, he had stated that on examination of the kannas it contained 2 ½ litres of liquid which he was satisfied that it was arrack. But in Ext.P2 mahazar it was mentioned that the 2 ½ litres capacity kannas contained 2 litres of liquid. There is no explanation forthcoming regarding the discrepancy of quantity of arrack said to have been seized. However, he

had further stated that he had taken sample sealed and labelled the same and also sealed the kannas and labelled the same and thereafter seized the same as per Ext.P2 mahazar. This part of the evidence of PW1 was corroborated by the evidence of PW2. Though they were cross examined at length, nothing was brought out to discredit the evidence on this aspect. They have denied the suggestion that the accused was taken from his tea shop and he has been falsely implicated in the case. So considering the circumstances, court below was perfectly justified in coming to the conclusion that the accused was arrested by PW1 along with MO1 kannas said to be contained two litres of arrack.

10. Mere seizure of the arrack alone is not sufficient to convict the accused for the offence alleged. It must be further proved by the prosecution that the articles reached the court in a tamper proof condition and the chemical analysis report relates to the representative sample said to have been taken from the contraband

articles seized from the possession of the accused. Unless this link is established by the prosecution, it cannot be said that prosecution has brought home the complexity of the accused beyond reasonable doubt. In this case, according to PW1 he had affixed seal on the kannas and affixed label containing the signatures of himself, witnesses and accused. He had sealed the sample seal bottle also in the same manner. But in the cross examination he had admitted that he had not handed over seal used for sealing article, nor he had submitted any specimen seal impression of the same also. PW5, the Excise inspector before whom the articles were produced, though stated that he had received the sealed kannas and bottle, he did not mention the nature of seal used. He had also no case that he had obtained the specimen seal impression of the seal used for sealing the articles and it was produced before the court along with property list. In Ext.P2 mahazar also the nature of seal used for sealing the articles was not mentioned. Further,

though in Ext.P2 and in the evidence of PWs1 and 2 it was mentioned that a label was affixed but in Ext.P7 property list, the presence of label was not mentioned. In Ext.P6 forwarding note also specimen the seal impression of the seal used for sealing the articles were not produced. A perusal of Ext.P6 forwarding note will go to show in the place provided for specimen seal impression what is provided is the specimen seal impression of the court and not the specimen impression of the seal said to have been used for sealing the article.

11. In the decision reported in **Krishnan v State** [2015 (1) KHC 822], this court has held that non-production of specimen seal impression along with forwarding note is fatal and that prevents the opportunity to the court to examine the genuineness of the articles produced and that benefit must be given to the accused. So under the circumstances, it cannot be said that prosecution has proved beyond reasonable doubt that articles were produced before the court in the same

condition in which it was seized and the chemical analysis report Ext.P8 relates to the representative sample of the sample said to have been taken from the contraband articles alleged to have been seized from the possession of the accused and these aspects were not considered by the court below before coming to the conclusion that the prosecution has proved the case against the accused that he was found to be in possession of arrack and consequential conviction entered by the court below for the said offence 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.

12. In view of the finding that the appellant is entitled to get acquittal , the sentence imposed is also not proper and the same is set aside.

In the result the appellant succeeds and the appeal is allowed. The order of conviction and sentence passed court below against the appellant for the offence under

Section 55(a) of the Abkari Act are hereby set aside. The 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 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 this purpose.

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

Sd/-

K.RAMAKRISHNAN, JUDGE

SKV