

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

WEDNESDAY, THE 2ND DAY OF DECEMBER 2015/11TH AGRAHAYANA, 1937

CRL.A.No. 1024 of 2004 (A)

SC 227/2001 of ADDL.DISTRICT COURT (ADHOC-II), ALAPPUZHA

APPELLANT(S)/ACCUSED::

SHAMSUDEEN
KOCHUVEETIL THARAYIL, KANNIMEL MURI
VALIKUNNAM VILLAGE, ALAPPUZHA DISTRICT.

BY ADVS.SRI.S.SANAL KUMAR
SMT.BHAVANA VELAYUDHAN

RESPONDENT(S)/COMPLAINANT::

STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.

R1 BY PUBLIC PROSECUTOR SHRI. JIBU P. THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 02-12-
2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SKV

K.RAMAKRISHNAN, J.

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Crl. Appeal No.1024 OF 2004

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Dated this the 2nd day of December, 2015

JUDGMENT

Accused in SC 227/2001 on the file of the Additional Sessions Court (Adhoc-II), Alappuzha is the appellant herein. The appellant was charge sheeted by the Excise Inspector, Mavelikkara in Crime No.58/1998 of Mavelikkara Excise Range under Section 55(g) of the Abkari Act.

2. The case of the prosecution in nutshell was that on 11.8.1998, at about 12.15 pm, the accused was found to be in possession of 30 litres of wash, a material used for manufacturing illicit arrack in a 35 litres plastic can near the house of one Kochuveetil Maniamma in violation of the provisions of the Abkari Act and thereby he had committed the offence punishable under Section 55(g) of the Abkari Act. After investigation, final report was filed before the Judicial First Class Magistrate Court, Kayamkulam, where it was taken on file as CP.16/2001.

After complying with the formalities, the learned Magistrate committed the case to Sessions Court, Alappuzha under Section 209 of the Code of Criminal Procedure (hereinafter referred to as the Code). After committal, the case was taken on file by the Sessions Judge as SC 227/2001 and the same was made over to Additional Sessions Court, (Adhoc-II), Alappuzha for disposal.

3. When the accused appeared before the court below, after hearing both sides, charge under Section 55 (g) of the Abkari Act was framed and same was read over and explained to him and he pleaded not guilty. In order to prove the case of the prosecution, PWs1 to 7 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 and he denied all the incriminating circumstances brought against him in the prosecution evidence. He had further stated that he had not committed any offence and he has been falsely implicated

in the case and no article was seized from his possession. 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(g) of the Abkari Act and convicted him thereunder and sentenced him to undergo rigorous imprisonment for two years and also to pay a fine of Rs.1,00,000/- in default to undergo rigorous imprisonment for 3 months more. Aggrieved by the same, present appeal has been preferred by the appellant/accused before the court below.

4. Heard Smt. Bhavana Velayudhan, counsel representing Shri.S. Sanal Kumar counsel for the appellant and Shri. Jibu P. Thomas learned Public Prosecutor appearing for the State.

5. The counsel for the appellant submitted that though PWs1 and 7 have stated that they have affixed label from the spot, that fact was not mentioned in Ext.P1

mahazar. Further the nature of seal used was not mentioned by PW7, the detecting officer though PW1 had stated that PW7 had affixed his personal seal. The nature of seal used was not mentioned in Ext.P1 mahazar. Though three samples were said to have been taken from the wash alleged to have been seized, the other two bottles were not produced before the court for the purpose of satisfaction of the court that the representative sample taken from the wash said to have been seized from the possession of the accused have been produced before the court, though the balance wash was destroyed. The property list or the forwarding note were not marked so as to ascertain as to whether the specimen seal impression used for sealing the sample was provided in the forwarding note. So under the circumstances, it cannot be said that the prosecution has proved beyond reasonable doubt that the same articles alleged to have been seized from the possession of the accused had reached before the court and chemical analysis lab in a tamper free condition. So the appellant

is entitled to get acquittal.

6. On the other hand, the learned Public Prosecutor submitted that there was no challenge regarding the articles seized and there was no delay in producing the article. In such cases the irregularity in preparing the seizure mahazar or forwarding note will not have any impact on the case of the prosecution. Further it will be seen from Ext.P3 chemical analysis report that the sample seal was verified and according to the learned Public Prosecutor there is nothing wrong in the order convicting the accused and the conviction does not call for any interference.

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

on 11.8.1998, at about 12.30 pm, while PW7 the preventive officer attached to Mavelikkara Excise Range was doing patrol duty along with PW1 another Preventive Officer and other Excise Officials and when they reached near the place of occurrence from a distance of 30 meters, they saw the accused removing a cannabis which

was concealed in the earth and immediately they went to the spot and found the accused carrying MO1 kannas in his hand. On verification of the kannas, they found that it contained 30 litres of some liquid which on further examination they were satisfied that it was wash. He had taken three samples of 500 ml each and put marks as A, B and C and sealed the same and affixed label containing the signatures of himself, accused and the witnesses and thereafter destroyed the balance wash and affixed label and seal on MO1 kannas also and seized the same as per Ext.P1 mahazar in the presence of PWs4 and 5. He arrested the accused and prepared arrest memo and gave arrest intimation to his relative. Thereafter he came to Excise Office and entrusted the accused and contraband articles seized with the document prepared to PW2, Excise Inspector who registered Ext.P2 crime and occurrence report as Crime No.54/1998 of Mavelikkara Excise Range against the accused under Section 55(g) of the Abkari Act. He produced the accused along with the remand report and prepared property list and produced the

accused before court. He sent the forwarding note along with request to send the sample for analysis and sample was sent from court and Ext.P3 chemical analysis report obtained which shows that the sample is having the characteristic of wash and it contained 10.98% 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.P3 chemical analysis report and completed the investigation and submitted final report.

8. PWs3 and 4 are the alleged witnesses to the seizure and PW4 is one of the attessor to Ext.P1 mahazar. PW3 had denied having seen the seizure or arrest of the accused. Though PW4 had admitted his signature in Ext.P1, he denied having seen the seizure or arrest of the accused. So their evidence is not helpful to prove either the arrest or seizure of the article from the possession of the accused.

9. Then the prosecution relies on the evidence of PWs1 and PW7 to prove this fact. PW7 is the detecting

officer and PW1 is the officer who accompanied PW7 and witnessed the seizure. According to PW7, on 11.8.1998, at about 12.30 pm, he along with PW7 and others were doing patrol duty and when they reached near the house of one Smt.Maniamma, they saw the accused from a distance of 30 metres removing a kannas from the earth. Immediately they rushed to the spot and verified MO1 kannas and found that it contained 30 litres of some liquid which on verification they were satisfied that it was wash. According to PW1, he arrested the accused and took three samples of 500 ml each from the wash seen in MO1 kannas sealed and labelled the sample bottles and kannas and also seized the same as per Ext.P1 mahazar. According to him, he had affixed the label containing the signatures of himself, witnesses and the accused. But it was admitted by him that he had not mentioned this fact in Ext.P1 mahazar. Further he had also admitted that he had not mentioned the nature of seal used for sealing the article. Though PW1 had stated that PW7 had used his personal seal for that purpose, but this fact was not even

spoken to by PW7 when he was examined in court. However, that alone is not sufficient to come to the conclusion that the accused was not arrested as the accused had a case that he was arrested from somewhere and falsely implicated in the case. From the evidence, it can be concluded that the accused was arrested by PW7 along with a kannas said to be containing wash.

10. Mere seizure of article from the possession of the accused alone is not sufficient to convict him for the offence alleged. It must be proved by the prosecution that articles reached the court in a tamper proof condition and they will have to further prove that the chemical analysis report relates to the representative sample said to have been taken from articles said to have been seized from the possession of the accused and this has to be established by the prosecution. If that is not done, then it cannot be said that prosecution was able to bring home the complicity of the accused with the commission of crime.

11. In this case, though it is seen from Ext.P1 that

three sample bottles were taken by putting mark as A, B and C said to have been taken from the wash alleged to have been seized from the possession of the accused, only one bottle was produced and that was sent for chemical analysis and Ext.P3 report obtained. Further, it will be seen from the evidence of PWs 1 and 7 that they have affixed label on the sample bottle and also in the kannas. But this fact was not mentioned in Ext.P1 mahazar which is a contemporaneous document prepared by the detecting officer at the time of seizure itself. Further, there is no explanation forthcoming from the side of PW2 who registered the crime and produced the article before the court as to why he had not produced other two bottles said to have been taken as sample by PW7 so as to satisfy the court that all these samples were representing the large quantity of wash said to have seized from the possession of the accused.

12. Further the property list and forwarding note were not marked in this case. It is quite unfortunate that neither the prosecutor who is conducting the case in the

lower court nor this Court is also taking interest in getting the documents produced in court marked, so as to enable the court to verify those documents as well for the purpose of proper adjudication of the case. But however, the property list and the forwarding note were available in the case records in this case. Sometimes those documents also will not be available and the lower courts were not sending the entire documents along with the case regards to the appellate court so as to enable the appellate court to verify the documents available or said to have been produced by the investigating agency. In this case, the property list produced also shows that one cannas of 35 litres and sample bottle containing 500 ml in a 750 ml bottle, which is sealed and marked as 'A', were produced but it was not mentioned in the item No.1 that it was labelled and sealed. Further in the item No.'2' also the presence of label was not mentioned. It is true that the articles were produced before the court on the same day, but that alone is not sufficient to come to the conclusion that there was no possibility of tampering

before it was produced in court.

13. Further in the forwarding note, there is no specimen seal impression of the seal used by the detecting officer for sealing the sample was provided. This is intended to be provided for the purpose of enabling the court as well as the chemical examiner to verify the sample bottle and come to a conclusion as to whether it reached the court and chemical analysis lab without tampering. Though it is mentioned in Ext.P3 report that the specimen seal on the bottle was in tact and found tallied with the sample seal provided, it is not known from where the chemical examiner happened to verify the sample seal, especially when the forwarding note found in the court records did not contain the specimen seal impression.

14. Neither PW7 nor the Excise Inspector who registered the crime had a case that the specimen seal impression of the seal used for sealing the article has taken and produced the same along with the property list before the court. Further nature of seal used for sealing

the sample was not mentioned in the seizure mahazar as well. Under the circumstances, it cannot be said that the prosecution has proved beyond reasonable doubt that the articles which were said to have been seized from the possession of the accused reached the court in a tamper proof condition, so as to ensure that 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. This was so held in the decision reported in **Krishnan v State** [2015 (1) KHC 822]. This aspect has not been considered by the court below before coming to the conclusion that prosecution has proved beyond reasonable doubt that the accused was found to be in possession of wash and consequential conviction entered by the court below for the said offence is against 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 the doubt.

15. In view of the finding that the appellant is

entitled get acquittal, the sentence imposed is also not proper and the same is also set aside.

In the result 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 (g) of the Abkari Act are hereby set aside and 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 will stand cancelled. The fine amount if any remitted by the appellant before the court below is directed to be refunded to the appellant on making necessary application for this purpose.

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

Sd/-
K.RAMAKRISHNAN, JUDGE

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