

**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT:**

**THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN**

**MONDAY, THE 7TH DAY OF SEPTEMBER 2015/16TH BHADRA, 1937**

**CRL.A.No. 691 of 2005 ( )**  
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**SC.NO. 238/2004 OF ADDITIONAL SESSIONS COURT, FAST TRACK COURT-I,  
PALAKKAD DATED 04-04-2005**  
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**APPELLANT/ACCUSED :**  
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**GOPA & GOPAKUMARAN  
S/O.CHATHANKUTTY, PULATHOTTIL VEEDU, THRIPALAMUNDA  
AZHIYANNUR.**

**BY SENIOR ADVOCATE SRI.P. VIJAYA BHANU  
BY ADV. SRI.PRASUN S.**

**RESPONDENT/COMPLAINANT :**  
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**STATE OF KERALA  
REPRESENTED BY THE PUBLIC PROSECUTOR  
HIGH COURT OF KERALA, ERNAKULAM.**

**BY PUBLIC PROSECUTOR SRI. JIBU P. THOMAS**

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 07-09-2015,  
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

**Mn**

K.RAMAKRISHNAN, J.

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Crl. Appeal No.691 OF 2005

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Dated this the 7<sup>th</sup> day of September, 2015

JUDGMENT

The accused in SC No.238/04 on the file of the Additional Sessions Judge, Fast Track Court-I, Palakkad is the appellant herein. The appellant was charge sheeted by the Sub Inspector of Police, Malambuzha in Crime No.166/2003 of Kongad Police Station under Section 55(a) of Abkari Act.

2. The case of the prosecution in nut shell was that on 14.7.2003, at about 6.15 pm, the accused was found to be in possession of 2 litres of arrack for sale in front of the house No.111/241 in Thripalamunda in Kadambazhippuram Village in violation of the provisions of the Abkari Act and thereby he had committed the above said offence. The Offence under Sections 55(a) of Abkari Act (probably is a mistake for Section 8(1) read with Section 8(2) of Abkari Act.)

3. After investigation, final report was filed. The

case was taken on file as C.P. No.17/04 on the file of the Judicial First Class Magistrate's Court-II, Palakkad and the same was committed to the Sessions court by the learned Magistrate under Section 209 of Code of Criminal Procedure (hereinafter referred to as the Code). After committal, the case was taken on file as SC No.238/04 and it was originally made over to Assistant Sessions court, Palakkad for disposal and thereafter it was again withdrawn and made over to Additional Sessions Court (Adhoc-1), Palakkad by the Sessions Judge for disposal.

4. When the accused appeared before the court below, after hearing both sides charge under Section 55(a) of the Abkari Act 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 P7 and MOs 1 to 3 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 is innocent of the same and he has been falsely implicated in the case. Since the Court below found that it is not a fit case to acquit the accused under Section 232 of the Code, 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) of the Abkari Act and convicted him thereunder and sentenced him to undergo simple imprisonment for 1 year and also to pay a fine of Rs.1 lakh and in default to undergo Simple Imprisonment for 6 months. Set off was allowed for a period of detention already undergone by him in this case under Section 428 of the Code. Aggrieved by the same, the present appeal has been preferred by the appellant/accused before the court below.

5. Heard Sri. Vipin Narayanan representing for Senior Counsel Vijaya Banu appearing for the appellant and Sri.Jibu P.Thomas 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 properly explained. Further the investigation of this case conducted by a person who is not competent to conduct investigation and as such investigation is vitiated and it cannot be relied on, as he is not an Abkari Officer within jurisdiction, where the offence was committed.

7. On the other hand, the learned Public Prosecutor submitted that the aspect has not been raised by the appellant before court below, further the detention was made by a proper officer and the final report was filed by the Sub Inspector of Police who is the Abkari Officer of the place.

8. The case of the prosecution as emerged from the prosecution witness was as follows:–

On 14.7.2003 at about 6.00 pm while PW1 who is the the Sub Inspector of Police, Kongad Police Station was doing petrol duty along with PW2, he got information that the accused was conducting sale of arrack in front of his house and accordingly they reached the place at 6.15 pm and

found the accused with MO1 kannas and on seeing the police party, he tried to go away from that place. So they stopped him and on verification of MO1 Cannas having a capacity of 5 liters, it contained 2 liters of liquid, which on verification found that it was arrack. Thereafter he had taken three samples in 180 ml bottle and sealed the same and affixed the label containing the signatures of himself and witnesses. He sealed the kannas as well. There was a glass with him and he seized the MO1 kannas, MO3 sample bottles and MO2 glass as per Ext.P1 mahazar. He arrested the accused and prepared Ext.P2 arrest memo. Thereafter he came to the police station and registered Ext.P1 First Information Report as Crime No.166/2003 of Kongad Police Station against the appellant under Section 55(a) and (i) of Abkari Act. Thereafter as per the directions of the Circle Inspector of Police PW6, the Sub Inspector of Police, Malambuzha had conducted the investigation. He questioned the witnesses and recorded the statement. He went to the place of occurrence and prepared Ext.P5 Scene mahazar in the presence of PW4 and another. He produced

the accused before court along with the remand report. The articles were produced before court by PW1 along with the property list and sent Ext.P6 forwarding note with a request to send the sample for analysis and one of the sample was sent for analysis and Ext.P7 Chemical Examination Report was obtained. As per request of PW6, PW5 Village Officer prepared Ext.P5 Scene plan of the place of occurrence. PW6 completed the investigation and submitted the final report.

9. PW3 is an attester to Ext.P1 mahazar. Though he admitted his signature in Ext.P1 mahazar, he did not support the case of the prosecution. He had admitted that he knew the accused. Then the evidence available regarding seizure is that of PWs1 and 2, the Sub Inspector of Police who detected the crime and the police constable who accompanied him. PW1 had deposed that on that day he was doing patrol duty along with PW2 and while they were doing patrol duty they got information that the accused was engaged in sale of arrack near his house and immediately at about 6.15pm on that day they reached that place and saw the accused with MO1 cannas in his hand and on seeing the

police party, he got perplexed and tried to go away from that place, but PW1 stopped him. On verification of MO1 kannas he found that it contained 2 liters of liquor which on examination found that it was arrack. Thereafter he had taken three samples from the liquid including MO3 series of sample bottles and sealed the same and affixed label containing the signatures of himself, accused and witnesses. He sealed and labelled the kannas also in the same fashion. Thereafter he seized the same as Ext.P1 mahazar. Thereafter he came to the police station along with accused and the contraband articles and registered the case. PW2 also corroborated the evidence of PW1 on this aspect. Though they were cross examined at length nothing was brought out to discredit the evidence on this aspect. Merely because the independent witness did not support the case of the prosecution is not sufficient to disbelieve the seizure and court can rely on the evidence of the official witnesses if their evidence is trustworthy. This was so held in the decision reported in *Tahir v State (Delhi)* (AIR 1996 SC 3079) and also in *Karamjitj Singh v State (Delhi*

Admn.) (AIR 2003 SC 1311) . So under the circumstances, the court below has perfectly justified in coming to the conclusion that prosecution has proved seizure of MO1 kannas along with MO2 glass from the possession of the accused.

10. Mere seizure of the same liquor alone is not sufficient and it must be proved by the prosecution that the representative sample relates to the articles seized from the possession of the accused and the articles reached the court in a tamper proof condition so as to come to the conclusion that the same articles which was seized are produced before the court. Further, it was also held that delay in producing the seized properties before the court is not always fatal and if it is not properly explained then that benefit must be given to the accused. This was so held in the decision reported in Ravi v State of Kerala and Another [2011 (3) KHC 121].

11. In this case though PW1 had stated that he was in the custody of the article till it was produced in court and it was produced on 18.7.2003 though it was seized on

14.7.2003, there was no explanation forthcoming as to why they are not handed over to the investigating officer for the purpose of producing the same in the court in time. There is no explanation forthcoming from the side of PW1 for the delay in producing the articles as well. So under the circumstances the dictum laid down in the decision reported in *Ravi v State of Kerala* [2011 (3) KHC 121] cited (supra) will apply to this case. This aspect has not been considered by the court below at all and the court below came to the conclusion that since PW1 himself was in possession of the articles there is no possibility of tampering. But it may mentioned here that there was no document produced by him to show that he was in possession of the articles and also explaining the delay for producing the same as well. So under the circumstances it cannot be said the articles reached to the court in a tamper proof condition so as to come to the conclusion that the same articles said to have been seized were produced in court and that benefit must be given to the accused.

12. Further in this case the investigation was

conducted by the Sub Inspector of Police, Malambuzha and it is seen from his evidence that it was he who had submitted the final report as well. But though it is seen from the final report that it was filed by him after completing the investigation, there is another memo of evidence produced along with the final report which shows that it was signed by the Sub Inspector of Kongad. But PW1 had no case that it was he who had verified the investigation and then submitted the final report. So under the circumstances, it cannot be said that investigation was conducted by an officer having jurisdiction to conduct the investigation and the investigation is that benefit is given to the accused.

13. In the decision reported in Saji alias Kochumon v State of Kerala [2010 3 KLT 471] whereby this court has held that Sub Inspector of Police authorised to act as Abkari Officer can exercise his jurisdiction only within the territorial limits of his police station. Final report filed by another Sub Inspector is illegal. So it is clear from the above decision that merely because the Circle Inspector of

Police has authorised PW6 to conduct investigation, PW6 cannot be treated as an Abkari Officer competent to conduct an investigation within the jurisdiction of Kongad Police Station where the offence was committed. So under the circumstances, the investigation is vitiated and that aspect has not been considered by the court below.

14. Further, in the absence of the evidence given by PW1 or the Sub inspector who had signed the memo of evidence and submitted along with the final report so as to make it a final report filed by the Sub Inspector of Kongad Police Station, it cannot be said that final report was filed by a competent officer so as to make the cognisance good in law, especially when PW1 had not such case as well. So these aspects were not considered by the court below before coming to the conclusion that accused had committed offence under Section 55(a) of Abkari Act and consequential conviction entered by the court below is unsustainable in law and the same is liable to be set aside. The appellant is entitled to get acquittal of the charges levelled against him giving him the benefit out of. In view

of the finding that the appellant is entitled to get acquittal, the sentence imposed is improper 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 the Abkari Act are hereby set aside. The appellant is acquitted of the charges levelled against him giving the benefit of doubt. The appellant is set at liberty. The bail bond executed by him stands cancelled. The fine amount if any deposited by him is directed to be refunded to him by the court below on making necessary application by him for this purpose.

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

Sd/-

K.RAMAKRISHNAN, JUDGE

SKV