

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

TUESDAY, THE 14TH DAY OF JULY 2015/23RD ASHADHA, 1937

CRL.A.No. 712 of 2005 ()

AGAINST THE JUDGMENT IN SC 694/2004 of ADDL.DISTRICT & SESSIONS COURT
(ADHOC)-II, PATHANAMTHITTA DATED 17-03-2005

APPELLANT/ACCUSED:

ANISH KUMAR, S/O.VIJAYAN PILLAI,
SASTHAM THUNDIL VEEDU, VETTOOR MURI
KONNI THASHAM VILLAGE, KOZHENCHERRY TALUK
PATHANAMTHITTA DIST.

BY ADV. SRI.V.PHILIP MATHEW

RESPONDENT/COMPLAINANT:

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

R1 BY ADV. PUBLIC PROSECUTOR SMT SEENA RAMAKRISHNAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 14-07-
2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.D.RAJAN, J

.....
Crl.Appeal No.712 of 2005
.....

Dated 14th July, 2015

JUDGMENT

Appellant, who is the accused in S.C.No.694 of 2004 on the file of Additional Sessions Judge,(Fast Track II), Pathanamthitta challenges the judgment of conviction and sentence under Section 8(1) and (2) of the Abkari Act. The appellant was convicted under Section 8(1) and (2) and sentenced to simple imprisonment for two years and a fine of Rs.1 lakh and in default of payment of fine, simple imprisonment for one year.

2. The facts necessary for the indictment were that on 9.5.2002 at 12.15 pm, the Excise Inspector, Konni was conducting patrol duty with his excise party. When he reached at Chirayilkunnilpadi culvert on the Vettoor-thevarukadavu panchayat road, appellant was found carrying a ten litres can. On seeing the excise party, he attempted to retreat from there, PW1 intercepted him, examined the content in the can and detected arrack in it. He was arrested and the contraband articles were seized after preparing a mahazar. Reaching at the excise office, a crime was registered and after completing investigation, Excise

Inspector, Konni laid charge before Judicial First Class Magistrate-II, Pathanamthitta. From there, the case was committed to Sessions Court, which was transferred to Additional Sessions Court for trial. Prosecution examined PW1 to PW5 and marked Ext.P1 to P10(a) to prove the offence. The incriminating circumstances brought out in evidence were denied by the appellant while questioning him. He examined DW1 and marked Ext.D1 in support of his defence evidence. Trial court after analysing the evidence, convicted the appellant.

3. Learned counsel appearing for the appellant contended that there was no forwarding note produced before the Magistrate for sending the sample for chemical examination. Therefore, the report in Ext.P7 is not a conclusive proof with regard to the content in MO1 can. Moreover the Officer who laid charge was not examined which will cause prejudice to the appellant. The learned counsel relied on the decision reported in **Joseph V. State of Kerala** (2009(4) KHC 537), **Rajamma V. State of Kerala** (2014(1) KLJ 624), **Surendran and Another V. State of Kerala** (2013 (3) KHC 780) & **Nalinakshan V. State of Kerala** (2012(4)

KHC 464).

4. The arrack was seized by PW1. His evidence shows that on 9.5.2002, after 12' o clock in the noon, while he was conducting patrol duty, reached at Vettoor junction. He proceeded through the panchayat road from Vettoor to Thevarakavu and reached near Chirayilkunnu culvert, where the appellant was found carrying a can. PW1 intercepted him and inspected the can in the presence of independent witness and identified the content in the can as arrack. Appellant was arrested, he took 300 ml as sample from the can, for that he prepared Ext.P3. A case was registered against him and Ext.P4 is the occurrence report. He was produced before court on the same day with Ext.P5 remand application. Ext.P6 is the property list. MO1 is the can seized from the appellant. Due to lapse of time, the label affixed got damaged. The arrack seized was forwarded to the Chemical Examiner's lab through court. Ext.P7 is the Chemical Examiner's Report and in Ext.P7, the content of ethyl alcohol was notified as 26.85%. Ext.P8 is the forwarding list issued from the Magistrate Court.

5. The evidence of PW1 was supported by PW2, the Preventive Officer, Excise Office, Konni. He also deposed that

he accompanied PW1 and gave a similar version given by PW1. In order to avoid repetition of the same evidence, I am not reiterating the oral evidence of PW2. Analysing the oral evidence of PW1 and PW2, it is found that appellant was arrested and seized MO1 from him. PW5 conducted the investigation and verified the final report. In the light of the above evidence, I have considered whether the prosecution proved its case beyond reasonable doubt. The learned counsel appearing for the appellant examined DW1 and DW2 and contended that no such incident had occurred as alleged and appellant was looking after his aged sick father, but the trial court discarded that contention. Therefore, the defence put forward by the appellant is only to be discarded.

6. The independent witness did not support the evidence of PW1 and PW2. He is a native of Vettoor residing near the place of occurrence. He deposed that he did not see the arrest and seizure of MO1 and he denied the signature in Ext.P3. When independent witness present there did not support the prosecution case and denied the signature in the seizure mahazar, that itself create a doubt in the credibility of the prosecution case with regard to seizure of the contraband

articles from the possession of the appellant.

7. Appellant highlighted several improprieties committed by the detecting officer in the matter of preserving the sample and sending it for chemical examination. Taking sample is very important procedure, which is for ascertaining that arrack was seized from the possession of the appellant. To prove that point, the evidence of the chemical analysis report is a corroborating piece of evidence. Therefore, the prosecution has to prove that they acted in good faith while taking sample. Both independent witnesses PW3 and PW4 denied their signature in the seizure mahazar. Therefore, the responsibility of the prosecution is heavy to prove that as part of their official duty, they seized MO1 and prepared Ext.P3 at the time and place properly stated by them. PW1 and PW2 admitted that Ext.P3 mahazar was prepared at the place of occurrence. May be true, but there is no assurance that they complied the statutory formalities in forwarding the seized article to the court rightly in the manner stated in the Abkari Act.

8. Learned Public Prosecutor submitted that the forwarding note produced before the trial court was forwarded to the Magistrate Court and copy of the forwarding note was

sent to the Chemical Examiner's lab at the time when sample was forwarded. There is nothing to doubt the credibility of Ext.P7 report issued from the Chemical Examiner's lab.

9. In this context, the decision of this court in **Joseph's** case (supra) is very relevant. Paragraph 18 of the judgment reads as under:-

“The prosecution can succeed in securing a conviction against the appellant only if it is shown that the sample which was subjected to chemical analysis as evidenced by Ext.P4 certificate was the very same sample which was drawn from the bulk quantity of contraband liquor allegedly held by the accused and which after change of hands, eventually reached the hands of the chemical examiner”.

Ext.P6 property list prepared by the Excise Inspector shows that it was produced before court on 9.5.1992. But the forwarding list Ext.P8 was issued from Judicial First Class Magistrate -II, but no forwarding note furnished by the Excise Inspector for sending the arrack to Chemical Analyst's Lab. When there is no request it is another infirmity in the

prosecution case. PW5, who conducted investigation has no case that he had made such request or made a forwarding note. It is not explained how the Magistrate forwarded the sample bottle to the Chemical Examiner's Lab. A similar view was taken in **Rajamma's case** (supra), wherein it was held as follows:

“ In this case no forwarding note or requisition for sending the samples for chemical analysis is prepared and filed before the Court. If a normal requisition or forwarding note is prepared and filed before the Court, the same would have contained the sample seal, of the seal allegedly affixed by PW1 on the sample bottle”.

10. Therefore it is the primary responsibility of the excise officials to prepare a forwarding note and produce it before the Magistrate Court from where the seized arrack has to be sent over to the Chemical Examiner's lab for examination. When there is non compliance of the above provision, the appellant is entitled to get benefit of doubt. Moreover there is no independence evidence which will also create a doubt in the alleged seizure.

In the result, the conviction passed by the trial court under Section 8(2) of the Abkari Act is set aside. Appellant is set at liberty. Appeal is allowed.

P.D.RAJAN, JUDGE

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