

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. 904 of 2006 ()

AGAINST THE JUDGMENT IN SC 41/2002 of ADDL.SESSN.COURT (ADHOC-II)
KASARAGODE DATED 07-04-2006

AGAINST THE ORDER IN CP 142/2001 of J.M.F.C., KASARAGOD DATED 22-01-2002

APPELLANT/ACCUSED::

JOHN MONTHERO, AGED 37 YEARS,
S/O. BENJAMIN MONTHERO, MANDECOP HOUSE,
KUDAL MARKALAY
KASARAGOD DISTRICT.

BY ADVS.SRI.M.SASINDRAN
SRI.M.B.PRAJITH

RESPONDENT/RESPONDENT::

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

BY 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:

K. RAMAKRISHNAN, J.

.....
Crl.A.No.904 of 2006
.....

Dated this the 9th day of November, 2015

JUDGMENT

The accused in SC.No.41/2002 on the file of the Additional Sessions Court, Adhoc-II, Kasaragod is the appellant herein. The appellant was charge sheeted by the Sub Inspector of Police, Kumbala police station in Crime No.51/2001 of Kumbala police station under section 55(a) of the Abkari Act (ought to be under sections 8(1) and (2) of the Abkari Act).

2. The case of the prosecution in nutshell was that, on 29.3.2001, at about 6.30 p.m, near Subbayyagatt road junction at Kudal Markala, the accused was found to be in possession of 1.200 litres of arrack in 120 plastic packets of 100 ml each intended to be sold in Karnataka only 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.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court, Kasaragod, where it was taken on file as C.P.No.142/2001. After complying with the formalities, the learned Magistrate committed the case to

Sessions Court, Kasaragod, where it was taken on file as S.C.No.41/2002 and it was originally made over to the Assistant Sessions Court, Kasaragod for disposal. Thereafter the case was withdrawn by the Sessions Court and made over to the Additional Sessions Court, Fast Track-II, Kasaragod for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under section 55(a) 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 4 were examined and Exts.P1 to P7 and MO1 series, MO2 series and MO3 were marked on their side. After closure of the prosecution evidence, the accused was questioned under section 313 of the Code of Criminal Procedure (hereinafter referred to as 'the Code') and he denied all the incriminating circumstances brought against him in the prosecution evidence. He had further stated that no article was seized from his possession and in fact, the said police officer came to his house at 12 midnight and took him to the police station and thereafter he has been falsely implicated in the case. Since 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 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 two years and also to pay a fine of Rs. One lakh, in default to undergo rigorous imprisonment for three months more. Set off was allowed for the period of detention already undergone. Aggrieved by the same, the above appeal has been preferred by the appellant/accused before the court below.

5. Heard Sri. Subash, counsel representing counsel for the appellant, Sri.M.Sasindran and Smt. Seena Ramakrishnan, Public Prosecutor appearing for the State.

6. Counsel for the appellant submitted that independent witnesses to the seizure turned hostile and except official witnesses, there is no other evidence to prove the seizure. Further, though the articles were alleged to have been seized on 29.3.2001 at 6.30 p.m, they were produced before court only on 31.3.2001 and the delay has not been explained. There is nothing mentioned about MO2 series and affixture of label was not mentioned either in the property list or in the seizure

mahazer which was spoken to by PWs 1 and 4. That shows that it was not prepared at the place as claimed. So, the prosecution has not proved beyond reasonable doubt that the article reached court in a tamper free condition and that benefit ought to have been given by the court below. He has also submitted that there is no sample seal provided in the forwarding note which is mandatory. He had relied on the decisions reported in **Ramankutty v. Excise Inspector, Chelannur Range** (2013 (3) KHC 308) and **Krishnan v. State** (2015 (1)KHC 822) in support of his case.

7. On the other hand, learned Public Prosecutor submitted that detection was made on the midnight of 29.3.2001 and the property list was prepared on the same day after detection and it was produced on the next day. So there is no delay. Further, the evidence adduced will go to show that the prosecution has proved the case against the accused beyond reasonable doubt and no interference is called for.

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

On 29.3.2001, at about 6.30 p.m, while PW4, the Sub Inspector of Police, Kumbala police station was doing patrol

duty along with PW1 and others and when they reached the place of occurrence, they saw the accused coming with MO3 plastic bag and on seeing the police party, he ran away from the place. So they chased him and caught hold of him and thereafter PW4 examined the contents of MO3 plastic bag and found 120 plastic packets of 100 ml each containing some liquid. Thereafter he took six packets from the same and opened the same and examined the contents of the same and he was satisfied that it was arrack. It is also seen from the packets that there is a seal of Karnataka government showing that it was intended to be sold at Karnataka. He took liquid from six packets opened in two 375ml bottle of 300 ml each and sealed the same and affixed label containing the signature of himself and the witnesses and seized the same along with MO2 series and MO3 plastic bag as per Ext.P1 mahazer in the presence of PW3 and another. He arrested the accused and prepared Ext.P2 arrest memo. He came to the police station and registered Ext.P4 First Information Report as Crime No.51/2001 of Kumbala police station against the accused under section 55(a) of the Abkari Act. He prepared Ext.P5 property list and produced the articles before court. He sent

Ext.P6 forwarding note to court with request to send sample for analysis and sample was sent from court and Ext.P7 chemical analysis report shows that sample contained 24.78 and 27.07% by volume of ethyl alcohol respectively. He himself has conducted the investigation and went to the place of occurrence and prepared Ext.P3 scene mahazer in the presence of PW3 and another. He questioned the witnesses and recorded their statements. He collected the chemical analysis report, completed the investigation and submitted final report before court.

9. The prosecution relies on the evidence of Pws 1 to 4 and Exts.P1 to P7 and MO1 series, MO2 series and MO3 to prove their case. PW2 is an independent witness to the seizure. Though he admitted the signature in Ext.P1 mahazer, he denied having seen the seizure and arrest of the accused. But he had stated that he knew the accused. So it is clear from this 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 PW4, the detecting officer and PW1, the police officer who accompanied

him. PW4 had stated that on that day they were doing patrol duty and at 6.30 p.m when they reached that place, they saw the accused coming with MO3 plastic bag in his hand and on seeing the police party, he ran away from the place. So they chased him and caught hold of him and examined the contents of MO3 plastic bag and found that it contained MO1 series of 120 plastic packets each containing 100 ml of some liquid. Out of 120 packets, he took MO2 series from the same, opened the same, examined the same and found that it was arrack. Further it is seen on the packets that there is a seal of Government of Karnataka showing that it is intended to be sold at Karnataka. So he arrested the accused and came to the police station after seizing the article as per Ext.P1 mahazer after taking sample and sealing the same. Thereafter he registered the case. PW1 had corroborated the evidence of PW4 on this aspect. They denied the suggestion that the accused was taken from his house on 12 midnight on that day and taken to the police station and falsely implicated in the case. Except the suggestion given, there is no other evidence adduced on the side of the accused to prove this fact. So court below was perfectly justified in rejecting the defence of the

accused that he was falsely implicated in the case and relying on the evidence of PWs1 and 4 came to the conclusion that the prosecution has proved beyond reasonable doubt that the accused was arrested on 29.3.2001 at about 6.30 p.m along with 120 packets said to be containing arrack and the seizure and arrest are proper.

11. Mere proof of seizure of some packets said to be containing liquor said to be arrack alone is not sufficient to prove their case. It must be further proved by the prosecution that the articles reached the court in a tamper proof condition and chemical analysis report relates to the representative sample taken from the contraband article alleged to have been seized from the possession of the accused. Unless the link is proved, it cannot be said that the prosecution has brought home the complexity of the accused in the commission of the crime.

12. It is also settled law that mere delay in producing the article is not sufficient to doubt the genuineness of the articles. If delay is explained to the satisfaction of the court, the court can ignore the delay. But if the delay is not explained, then that benefit must be given to the accused. This was so

held in the decision reported in **Ravi v. State of Kerala** (2011 (3) KHC 121) and followed in **Ramankutty v. Excise Inspector, Chelannur Range** (2013 (3) KHC 308). In this case, the seizure and arrest were effected on 29.3.2001 at 6.30 p.m. The case was registered on the same day at 10.30 p.m. The First Information Report was produced before court on 30.3.2001. It is seen from the seizure mahazer that it also reached the court on 30.3.2001. In the evidence, PWs 1 and 4 had stated that apart from sealing the bottle, label was also affixed containing the signature of the accused, witnesses and PW4. It was not mentioned in Ext.P1 mahazer that such a label was affixed. Further, though Ext.P5 property list was prepared on 30.3.2001, the articles were produced before court only on 31.3.2001 and affixture of label on the sample bottle was not mentioned therein also. It is true that in Ext.P5 it was mentioned that empty packets were also produced. It will be seen from Ext.P5 property list that entire 120 packets containing arrack were produced. But court below came to the conclusion that along with item 2 mentioned in Ext.P5, six empty packets were also pinned together. So it can only be presumed that it was produced along with the article. But

such an inference could not be drawn as it was returned for safe custody on 31.3.2001 itself and only later it was produced in court. Further there is no explanation given by PW4 for not producing the articles on 30.3.2001 itself along with other documents. He had only stated that he was in possession of the same till it was produced. That is not sufficient in view of the dictum laid down in the above decisions. So, under the circumstances, it cannot be said that the prosecution has proved beyond reasonable doubt that the articles said to have been seized have reached the court in tamper free condition and Ext.P8 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 so as to convict him for the offence under section 55(a) of the Abkari Act and these aspects were not considered by the court below before coming to the conclusion that the prosecution has proved beyond reasonable doubt that the accused was found to be in possession of arrack and consequential conviction entered by the court below on this aspect 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.

13. The other contention raised by the counsel for the appellant that there was no sample seal provided in the forwarding note appears to be not correct as perusal of Ext.P6 forwarding note shows that the specimen seal impression of the seal used was provided and it was found to be tallied with the seal seen on the bottle which is evident from Ext.P7 report. However, in view of the finding that the appellant is entitled to get acquittal on other grounds, the order passed by the court below has to be set aside. In view of the finding that the appellant is entitled to get acquittal, the sentence imposed is 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 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 will stand cancelled. The court below is directed to refund the fine amount, if any, remitted by the appellant to him on making necessary application in that regard.

Office is directed to communicate a copy of this judgment to the concerned court immediately.

Sd/-

K. RAMAKRISHNAN, JUDGE.

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/true copy/

P.S to Judge

