IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

THURSDAY, THE 21ST DAY OF MAY 2015/31ST VAISAKHA, 1937

CRL.A.No. 1297 of 2004 (A)

AGAINST THE JUDGMENT IN SC 213/2004 of III ADDITIONAL SESSIONS COURT, (ADHOC) FAST TRACK COURT NO.1 THRISSUR DATED 14-07-2004

APPELLANT(S)/ACCUSED:

THOMAS, S/O. THOMMAN,
KANDANATTIL HOUSE, UPPUZHI MUNIYATTUKUNNU DESOM
MUPLIYAM VILLAGE, MUKUNDAPURAM TALUK.

BY ADVS.SRI.P.VIJAYA BHANU
SRI.P.M.RAFIQ

RESPONDENT(S)/COMPLAINANT:

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

PUBLIC PROSECUTOR, ADV. SRI. GITHESH.R

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 21-05-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

acd

P.D. RAJAN, J.

Crl. Appeal No.1297 of 2004

Dated this the 21st day of May, 2015

JUDGMENT

This appeal is preferred against conviction and sentence in S.C.No.213/2004 of III Additional Sessions Judge (Adhoc), Fast Track Court No.1, Thrissur, for offence punishable u/s.8(1) and (2) of the Abkari Act.

2. The prosecution allegation was that on 30.7.2000 at 1.30 p.m. the appellant was found in possession of two bottles of arrack 750 ml each, near the gate of the rubber estate owned by John in Uppuzhi desom in Mupliyam Village by the Preventive Officer, Excise Enforcement and Anti Narcotic Squad. Appellant was arrested and the contraband articles were seized after preparing a mahazar. PW3

entrusted the seized articles and the appellant at the Excise Range Office, Irinjalakkuda where they registered a crime and ocurrence report. After completing investigation, Excise Inspector, Irinjalakkuda laid a charge before Judicial First Class Magistrate Court, Irinjalakkuda, from where it was committed to Sessions Court for trial.

3. To establish the averment, the prosecution examined PWs 1 to 5 and marked Exts.P1 to P10 as documentary evidence. Mos 1 and 2 were admitted as material objects. The incriminating circumstances brought out in evidence were denied by the appellant, while questioning u/s.313 of Cr.P.C. The trial Court after scrutinizing the oral and documentary evidence, convicted the accused u/s.58 of the Abkari Act and sentenced to

rigorous imprisonment for one year and to pay a fine of ₹1 lakh u/s.58 of the Abkari Act, in default of payment of fine, rigorous imprisonment for three months. Aggrieved by that, the appellant approached this Court with this appeal.

4. The learned counsel appearing for the appellant contended that there was no evidence with regard to the custody of seized articles, immediately after arrest and seizure of the articles as alleged by the prosecution. When there is no proper explanation for the custody of articles, the appellant is entitled to get the benefit of decision reported in **Sasidharan** v. **State of Kerala** [2007(1) KLT 720]. Moreover, sampling and sealing of the seized article were not properly explained by the Excise Officials. That will also affect the credibility of the prosecution

case. Therefore, he is entitled to get the benefit of doubt.

5. The learned Public Prosecutor submitted that there was no irregularity in the seizure and arrest of the accused. All statutory formalities were complied with by the Excise Officials as per the Abkari Act. The facts highlighted by the learned counsel for the appellant were not challenged in the trial Court. When there is no challenge with regard to such legal aspect, he cannot raise that point on this appellate stage.

6. Based upon the argument advanced by both sides, I have verified whether there is any illegality or irregularity in complying with the benevolent provisions of the Kerala Abkari Act. The offence was detected by PW3, Preventive Officer attached to the Excise

Enforcement and Anti-Narcotic Special Squad, Thrissur. His evidence shows that on 30.7.2000, while he was conducting patrol duty in Mukundapuram Taluk, he and his party reached the Uppuzhi desom, he saw the accused standing near the rubber estate of John, carrying a plastic bag. On seeing the Excise party, the accused became perplexed and they intercepted him. PW3 searched the bag and it contained 2 bottles of 750 ml each arrack. He tasted and smelled the liquid and convinced that it was arrack. Thereafter, he took samples of 180 ml from each bottle. The samples were sealed and labels were affixed at the place of occurrence in the presence of witnesses. Thereafter, he prepared Ext.P1 seizure. The accused was arrested after preparing Ext.P6 arrest memo and the copy of the arrest memo served on the close relatives also. Mos

1 and 2 and the appellant were produced before the Judicial First Class Magistrate Court, Irinjalakuda on the next day. Even though this witness was cross examined by the defence counsel, nothing has been brought out to discredit his evidence.

7. The seizure of Mos 1 and 2 were admitted by PW6, the Assistant Excise Inspector, Excise Range, Irinjalakkuda. He deposed that PW3 and his party arrested the appellant on 30.7.2000 and the seized articles were produced before the Excise Range Office, Irinjalakkuda. Subsequently, the contraband articles were produced before Court. Ext.P10 is the property list and Ext.P9 is the remand report. On the basis of the information, he registered O.R.36/2000 and Ext.P6 is the crime and occurrence report. PW2 admitted that he

conducted investigation in this case. He arrived at the place of occurrence and prepared Ext.P3 mahazar and Ext.P4 sketch and questioned the witnesses and obtained Ext.P5 chemical analysis report.

8. The independent witnesses present at the time of seizure did not support the prosecution case, but, they admitted the signature in Exts.P1 and P6. PW5 denied the signature in Ext.P6. The trial Court relied the decision of Apex Court in **Union of India and another** v. **Pradeepkumari & others** [AIR 1995 SC 2259] and opined that the evidence of PWs 1 and 3 cannot be set aside on the ground that they belongs to Excise Department. In view of the above conclusion of the trial Court, I am of the opinion that seizure of MO1 and MO2 were properly proved by the prosecution.

9. In this context, I have considered whether there is any violation of the provisions of the Abkari Act. PW6 in his evidence deposed that immediately after the arrest of the appellant by PW3, the contraband articles were produced before the Excise Range Office, Irinjalakkuda without any unnecessary delay. As per Section 5(a), the Preventive Officer, Excise Guard and Excise Inspector are also the competent officers u/s.40 of the Abkari Act. PW6 deposed that subsequently, the appellant was produced before Judicial First Class Magistrate Court, Irinjalakkuda. There is no illegality or irregularity in the procedure. Moreover, the samples were sent for chemical analysis through the Court, which was not challenged in the trial Court. Tampering of seal or signature was also not challenged. Therefore, the learned

Sessions Judge rightly anlaysed the evidence and convicted the appellant u/s.58 of the Abkari Act.

10. Section 8 of the Abkari Act deals with prohibition of manufacture, import, export, transport, transit, possession, storage, sales etc. Instead of convicting u/s.8(2) of the Abkari Act, the appellant was convicted u/s.58 of the Act and thereby imposed sentence . This Court in **Gopan** v. **State of Kerala** [2007(3) KLT 443] held that the mere possession of arrack in any form without any authority would only attract Section 8 and not Section 58 of the Abkari Act. In another decision reported in **Kelukutty** v. **State of Kerala** [2009(4) KLT 286] held that Section 8 deals exclusively with arrack, which has been banned in this State with effect from 3.6.1997. Therefore, the conviction u/s.58 is set aside and the

appellant is convicted and sentenced u/s.8(2) of the Abkari Act as follows:

(a) He is sentenced to imprisonment for 30 days and to pay a fine of ₹1 lakh, u/s.8(2) of the Abkari Act, in default of payment of fine, simple imprisonment for one month.

(b) The period of detention undergone by the appellant to be set off against the sentence of imprisonment.

P.D. RAJAN, JUDGE.

acd