

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

WEDNESDAY, THE 30TH DAY OF SEPTEMBER 2015/8TH ASWINA, 1937

CRL.A.No. 985 of 2005

**SC 95/2003 OF ADDITIONAL SESSIONS COURT (FAST TRACK) III,
MANJERI DATED 13-04-2005**

APPELLANT(S)/ACCUSED:

**KUNHADAN, S/O.POOLAKKAL KUIMBARAN KUNHAN,
KINARADAPPAN, URNGATTIRI AMSOM DESOM, ERNAD TALUK,
MALAPPURAM.**

BY ADV. SRI.BABU S. NAIR

RESPONDENT(S)/STATE:

**STATE OF KERALA,
REPRESENTED BY THE EXCISE INSPECTOR,
MANJERI EXCISE RANGE-THROUGH THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM, KOCHI-31.**

BY PUBLIC PROSECUTOR SMT.SEENA RAMAKRISHNAN

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 30-09-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

PJ

K.RAMAKRISHNAN, J.

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Crl. Appeal No.985 OF 2005

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Dated this the 30th day of September, 2015

JUDGMENT

The accused in SC No.95/2003 on the file of the Additional Sessions Court (Fast Track court- III) Manjeri is the appellant herein. The appellant was charge sheeted by the Excise Inspector Manjeri Excise Range in CR No.5/1999 of that Excise Range under Section 55(g) of the Abkari Act.

2. The case of the prosecution in nutshell was that on 16.8.1999, at about 9.30 pm, the accused was found to be in possession of 12 litres of wash a material used for distillation of arrack and found transitting the same at a place called Kinaradadappan 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.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court-I, Manjeri where it was taken on file as CP 83/2002. Thereafter the case

was committed to the Sessions Court Manjeri by the learned Magistrate under Section 209 of the Code of Criminal Procedure (hereinafter referred to as the Code). After committal, the case was taken on file as SC No.95/2003 by the Sessions Court Kollam and thereafter it was originally made over to Assistant Sessions Court, Manjeri for disposal. Thereafter when the Adhoc courts were established, the case was withdrawn and made over to Additional Sessions Court (Adhoc-III) Kollam for disposal by the Sessions Judge.

4. When the accused appeared before the court below, after hearing both sides, charge under Section 55 (g) 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, PWs1to 5 were examined and Exts.P1 to P9 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 he has been falsely implicated in the case. Since the evidence in this 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 four years and also to pay a fine of Rs.1,00,000/-, in default to undergo simple imprisonment for six months. Set off was allowed for a period of detention already undergone by him 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 Ms. Nisha counsel representing Sri Babu S Nair counsel appearing for the appellant and Smt. Seena Ramakrishnan learned Public Prosecutor appearing for the State.

6. The learned counsel appearing for the appellant submitted that the residue of the alleged contraband article said to have been seized from the possession of accused were destroyed by the Excise Inspector, so the court below has no opportunity to verify the same. Further the independent witnesses to seizure turned hostile and it is not safe to rely on the official witnesses alone to convict the accused in such circumstances. The learned counsel also submitted that if for any reason this court is not inclined to interfere with the conviction, sentence imposed is harsh and pleaded for leniency.

7. On the other hand, learned Public Prosecutor submitted that the arrest and detection and seizure were proved properly. Further, there was no delay in producing the article and there is no evidence adduced on the side of the accused to prove that he has been falsely implicated the case. So under the circumstances the conviction entered by the court below is proper and does not call for any interference.

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

On 16.8.1999, at about 9.30 pm, while PW1 the Excise Inspector along with PW2 and others were doing patrol duty and when they reached the place of occurrence, they saw the accused coming with MO1 aluminium pot and on seeing the Excise party, he tried to go away from that place. So they stopped him. On verification of the aluminium vessel, it contained 12 litres of liquid, which on verification by PW1 revealed that it was wash, a material used for distillation of arrack. He took 750 ml. sample out of the liquid and then destroyed the remaining liquid from the spot. He sealed the sample bottle and affixed the label containing the signatures of himself, accused and witnesses and affixed label on MO1 pot also in the same manner and seized the same as per Ext.P1 mahazar in the presence of PWs3 and 4. He arrested the accused and prepared Ext.P2 arrest memo and gave Ext.P3 arrest intimation to the relative. Thereafter he came to Excise office along with the

accused and the contraband article seized and registered Ext.P4 occurrence report as CR No.5/1999 of Manjeri Excise Range against the accused under Section 55(g) of the Abkari Act.

9. He produced the accused along with remand report on the next day itself. He had produced the contraband articles before court along with Ext.P6 property list on the next day and also sent Ext.P5 forwarding note with a request to send the sample for analysis. Accordingly, the sample was sent from court and Ext.P9 chemical analysis report obtained, which shows that the article contained 6.30% by volume of ethyl alcohol and it is having the characteristic and odour of wash. The investigation was conducted by PW5, the Excise inspector who questioned the witnesses and recorded their statement and he prepared Ext.P7 scene mahazar and Ext.P8 sketch plan of the place of occurrence and completed the investigation and submitted final report.

10. PWs3 and 4 were the independent witnesses to

the seizure. Though they admitted their signature in Ext.P1 seizure mahazar and acquaintance with the accused, they denied having witnessed the seizure and arrest of the accused. So it is clear from their conduct that they were now trying to help the accused and that was the reason why they were not supporting the case of the prosecution.

11. Then the evidence is that of PWs1 and 2 to prove the seizure, arrest and other formalities. PW1 had categorically stated that he along with PW2 were doing patrol duty on that day and at about 9.30 pm on that day they saw the accused coming with MO1 coming aluminium pot and on seeing the Excise party he tried to go away from the place. So they stopped him and on verification of the contents of MO1 it contained 12 litres of some liquid which on verification by PW1 was convinced that it was wash a material used for distillation of arrack. He took sample from the wash and sealed and affixed label on the same and destroyed the remaining wash from the spot. He labelled MO1 vessel also in the same fashion

and thereafter he arrested the accused and prepared Ext.P2 arrest memo and gave Ext.P3 arrest intimation to his relative. He seized the articles as per Ext.P1 mahazar in the presence of Pws3 and 4. The evidence of PW1 was corroborated by the evidence of PW2. Though they were cross examined at length, nothing was brought out to discredit their evidence on this aspect. It is settled law that merely because independent witnesses to seizure did not support the seizure alone is not sufficient to disbelieve the prosecution case on this aspect. Court can rely on the evidence of official witnesses if it is satisfied with its genuineness and trustworthiness. In this case nothing was brought out to disbelieve the evidence of PWs1 and 2 in this aspect. So under the circumstances, court below was perfectly justified in coming to the conclusion that the prosecution has proved beyond reasonable doubt that the accused was arrested by PW1 along with MO1 vessel containing 12 litres of liquid which according to the prosecution was wash, a material used for distillation of arrack.

12. It is seen from the evidence of PW1 that the articles were produced before court on the next day itself. This is strengthen by Ext.P4 property list. Ext.P5 forwarding note contains the specimen seal used for sealing the sample and it was seen from Ext.P9 chemical analysis report that the sample seen on the bottle tallied with the specimen seal provided. So that shows that the articles reached the court in a tamper free condition and it reached the chemical examiners office also in the same condition and the chemical analysis report relates to representative sample taken from the contraband article seized from the possession of the accused. Ext.P9 shows that sample contained 6.30% by volume of ethyl alcohol and it was also having the characteristic and odour of wash, a material used for distillation of arrack. So the prosecution has proved that the articles seized was wash, a material used for distillation of arrack, possession of which is an offence under Section 55(g) of Abkari Act and the court below was perfectly justified in convicting the appellant for the offence under Section 55(g) of the Abkri

Act. The factum of destruction of wash was mentioned in Ext.P1 mahazar itself and this is being done on the basis of instructions given under the Excise manual as keeping of wash in the same condition will not be possible. So the conviction by the court below is just and proper. It does not call for any interference.

13. As regards the sentence is concerned, the court below had sentenced the accused to undergo rigorous imprisonment for four years and also to pay a fine of Rs.1,00,000/-, in default to undergo simple imprisonment for six months. Persons who are committing offence under Abkari Act are doing the same knowing fully well that it is an offence and ignoring the consequence their act on something. Further if such persons were found guilty, they must be dealt with very severely and with deterrence as well, as only deterrent punishment will prevent them from committing similar offence in future. But at the same time, court can consider, while imposing the sentence, his antecedents and quantity seized and the possibility of his reformation as well. In this case, the

prosecution had no case that he had involved in any other crime of similar nature earlier. Further he was aged 52 years at the time when the offence was committed. So considering these aspects, this Court feels that some leniency can be shown in awarding sentence. While retaining the fine with default sentence reducing the substantive sentence to nine months and the nature of imprisonment can be converted to simple imprisonment from rigorous imprisonment and that will be sufficient and that will meet the ends of justice. So the sentence is modified as follows:

The appellant is sentenced to undergo simple imprisonment for nine months and also to pay a fine of Rs.1,00,000/-, in default to undergo simple imprisonment for three months.

So the Appeal is allowed in part. The order of conviction passed by the court below against the appellant and sentence of fine of Rs.1,00,000/- imposed by the court below against the appellant under Section 55 (g) of the Abkari Act are hereby confirmed. But

substantive sentence and default sentence imposed are set aside and the same is modified as follows:

The appellant is sentenced to undergo simple imprisonment for nine months and also to pay a fine of RS.1,00,000/- in default to undergo simple imprisonment for three months. Set off is allowed for a period of detention if any undergone by him. If any fine amount has been remitted either as directed by this court, then the appellant need only deposit the balance fine amount and if he is not depositing the balance fine amount, he need only to undergo pro rata imprisonment as provided under Sections 68 and 69 of the Code. With the above modification of the sentence alone the appeal is allowed in part and disposed of accordingly.

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

Sd/-

K.RAMAKRISHNAN, JUDGE

SKV