

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

TUESDAY, THE 8TH DAY OF SEPTEMBER 2015/17TH BHADRA, 1937

CRL.A.No. 991 of 2005 ()

AGAINST THE ORDER/JUDGMENT IN SC 350/2003 of ADDITIONAL DISTRICT COURT
(ADHOC), MANJERI DATED 04-06-2005

APPELLANT/ACCUSED:

VELAYUDHAN, S/O. VELU,
MEKKALAMVEETIL, MATHAKKODE,
AREACODE, MALAPPURAM DISTRICT.

BY ADV. SRI.BABU S. NAIR

RESPONDENT/STATE::

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

BY . PUBLIC PROSECUTORSRI.JIBU P. THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 08-09-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. RAMAKRISHNAN, J.

.....
Crl.A.No.991 of 2005
.....

Dated this the 8th day of September, 2015.

JUDGMENT

The accused in S.C.No.350/2003 on the file of the Additional Sessions Court (Adho-I), Manjeri is the appellant herein. The appellant was charge sheeted by the Excise Officer, Manjeri Excise Range in Crime No.7/2002 of Manjeri Excise Range under Section 55(a) of the Abkari Act.

2. The case of the prosecution in nutshell was that on 25.7.2002 at about 4.15 p.m, the accused was found to be in possession of 2 litres of arrack at Mathakkad 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 (it should be under section 8(1) after amendment to the Abkari Act which came into force from 3.6.1997).

3. After investigation, final report was filed before the Judicial First Class Magistrate Court, Manjeri where it was taken on file as C.P.No.56/2003. The learned Magistrate committed the case to Sessions Court, Manjeri under section 209 of the Code of Criminal Procedure (hereinafter referred to

as 'the Code') where it was taken on file as SC.No.350/2003 and thereafter it was made over to the Additional Sessions Court (Adhoc-I), Manjeri 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 (it was not clearly mentioned in the judgment under what provision the charge was framed, but it is seen from the court charge that the charge was framed under section 55 (a), but in fact it ought to be under section 8(1) of the Abkari Act) 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 P10 and MO1 were marked on their side. 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. Since the evidence in this case did not warrant an acquittal under section 232 of the Code, the accused was called upon to enter his defence by the Additional Sessions Judge but no defence evidence was

adduced on his side. After considering the evidence on record, the court below found the appellant guilty for the offence under section 55(a) (which was not clearly mentioned in the judgment but it can be inferred from the discussion) and convicted him thereunder and sentenced him to undergo rigorous imprisonment for three years and also to pay a fine of Rs.One lakh, in default to undergo simple imprisonment for six months. Aggrieved by the same, the present appeal has been preferred by the appellant before the court below.

5. Heard counsel for the appellant Smt.Smitha Babu representing Babu S.Nair and Smt. Seena Ramakrishnan, Public Prosecutor appearing for the State.

6. Counsel for the appellant submitted that there is some discrepancy in the evidence of Pws1, 2 and 6 investigating officers regarding the place of occurrence. According to PW1, though he did not mention about the width of the road, he had stated that it is not fit for vehicular traffic. PW2 had stated that it is having an approximate width of 6 metres whereas PW6, the investigating officer stated that it was having a width of only 3.5 metres. That shows that there was no such incident occurred as claimed by the prosecution and that

aspect has not been properly considered by the court below. If there is any doubt regarding the seizure especially when independent witnesses turned hostile to the prosecution, the court must weigh such discrepancy in the evidence and that benefit must be given to the accused. Counsel for the appellant also submitted that there is no evidence to show that articles were produced before the Magistrate on the same day and it was not mentioned by the investigating officer when examined as well. So the genuineness of the article produced also has to be considered and that benefit must be given to the accused. Learned counsel for the appellant submitted that the sentence imposed is harsh.

7. On the other hand, learned Public Prosecutor submitted that the evidence adduced on the side of the prosecution proved the case against the accused beyond reasonable doubt and articles were produced before the Magistrate on the same day and as directed by the Magistrate, it was produced before court on the next day and there is no delay in producing the article as well.

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

On 27.5.2002 at about 4.15 p.m while Pws 1 and 2, the Preventive Officer and another excise official were doing patrol duty along with the party and when they reached in front of the house of one Mohanan, they saw the accused coming with MO1 kannas in his hand and on seeing the excise party, he got perplexed and so they stopped him and on examination of the kannas, it was revealed that it contained some liquid and on examination by smelling and tasting, they were satisfied that it was illicit arrack. Thereafter PW1 had arrested the accused and prepared Ext.P1 arrest memo and took sample from the liquid in MO1 kannas, sealed the same and labelled the same with the signature of himself and the accused and they sealed the kannas also in the same manner and affixed label as mentioned above and seized the same as per Ext.P2 mahzer in the presence of Pws 2 and 3. At the time when the proceedings were going on, wife of the accused came there and they gave Ext.P3 arrest notice to her. Thereafter they came to the excise office and entrusted the same to PW5, the Excise Inspector, who registered Ext.P6 occurrence report as Crime No.7/2002 under Section 8(1) and 55(a) of the Abkari Act. Thereafter he prepared Ext.P7 property list and

Ext.P8 forwarding note and produced the article along with the accused with the remand report before the Magistrate on the same day and the accused was remanded to custody and as directed by the Magistrate, he produced articles before court on the next day. Investigation in the case was conducted by PW6. As per the request of the Excise Inspector sample was sent for analysis from court and Ext.P9 report obtained which shows that sample contained 19.86 % volume of ethyl alcohol. PW6 completed the investigation and submitted Ext.P10 final report before court.

9. Pws 3 and 4 were the attestor to Ext.P2 mahazer. Though they admitted the signature, they denied having witnessed the seizure and arrest of the accused. But both of them admitted that they knew the accused. So it is clear from this that they are now trying to help the accused and that was the reason why they are not supporting the prosecution.

10. Then the evidence is that of Pws 1 and 2 regrading seizure. PW1 had categorically stated that he was working as a Preventive Officer at the relevant time and he was doing patrol duty along with PW2 and others and when they reached

the place of occurrence, they saw the accused coming with MO1 kannas in his hand and on seeing them, he got perplexed. So they stopped him and he verified the contents of the kannas and found that it was having two litres of some liquid. When examined by smelling and tasting, he was convinced that it was arrack. He convinced the same to the witnesses present there also. Thereafter he arrested the accused and prepared arrest memo and gave arrest intimation to his wife who came there at that time. He took the sample from the liquid and sealed the same and affixed label containing signatures of himself and the accused. He sealed and labelled MO1 kannas also in the same fashion. He seized the same as per Ext.P2 mahazer. Thereafter he came to excise office and entrusted the same to PW5, the Excise Inspector who later registered the case. Evidence of PW1 on this aspect was corroborated by PW2. Though they were cross examined at length, nothing was brought out to discredit their evidence on this aspect.

11. It is true that PW1 had stated that it is not a road worth for vehicular traffic. But that does not mean that no vehicle could be taken through that road. The evidence of

PW2 is to the effect that the road was having approximate width of 6.5 metres, whereas according to PW6 that was having a width of 3.5 metres. But they are not giving the width of the road with precision and correct measurement but that was given only approximately. Further there is nothing to disbelieve the evidence of Pws 1 and 2 regarding the aspect of arresting the accused with MO1 kannas in his hand. Further MO1 was identified by both the witnesses before court as well. The manner in which he has sealed the article was also mentioned by him. All those things will go to show that there is nothing to disbelieve the evidence regarding seizure effected by him as contended by the counsel for the appellant.

12. It is settled law that merely because independent witness to the seizure did not support the seizure alone is not sufficient to disbelieve the seizure. The court can rely on official witness's evidence on this aspect if it is trustworthy and believable. In this case I do not find any reason to disbelieve the evidence of Pws 1 and 2 on this aspect. So the court below was perfectly justified in coming to the conclusion that the prosecution has proved beyond reasonable

doubt that the accused was arrested along with the contraband article .

13. It will be seen from Ext.P5 property list that articles were produced before the Magistrate at his residence on the same day at 7.30 p.m and the Magistrate has directed that articles to be produced before court on 28.5.2002, that is on the next day and it is seen from the property list that it was produced before court on 28.5.2002. The evidence of PW5 also will go to show that he had produced the articles before the Magistrate on the same day and as directed by the Magistrate, it was produced before court on the next day and he was in possession of the article till it was produced before court. So under the circumstances there is no merit in the submission made by the counsel for the appellant that the article were not produced before court immediately so as to come to a conclusion that it was produced in court in full proof condition. It is seen from the documents as also from the endorsement made by the magistrate that including forwarding note was produced before the Magistrate on 27.5.2002 at 6.30 p.m at his residence. So all these things will go to show that articles were produced before the Magistrate forthwith

and there is no possibility of tampering of articles before it was produced in court as well. Further the chemical analysis report will got to show that the sample contained ethyl alcohol of 19.86 % by volume and there is no case for the accused that the article seized was not arrack also. So under the circumstances, it can be safely concluded that the prosecution has proved beyond reasonable doubt that the accused was found to be in possession of arrack which is an offence under section 8(1) but not under section 55(a) of the Abkari Act. So the conviction entered by the court below can be converted to one under section 8(1) instead of section 55(a) of the Abkari Act and conviction on that aspect is perfectly justifiable and the same is confirmed.

14. As regards the sentence is concerned, the court below sentenced the accused to undergo rigorous imprisonment for three years and also to pay a fine of Rs. One lakh in default to undergo simple imprisonment for six months. As regards abkari offence is concerned, the persons who are committing the offence are committing the same knowing that it is an offence and ignoring the consequences of their act on the persons who are consuming the illegally manufactured arrack.

Showing undue leniency in sentencing policy in such cases will give a wrong message to the society. But at the same time while imposing sentence, the quantity taken and his previous criminal antecedents etc also be considered. There is no evidence before the court that he is a previous offender. The arrack that was found in his possession was only two litres. The minimum amount of Rs. One lakh as fine has been imposed. So considering these aspects this court feels that some leniency can be shown in awarding the substantive sentence and reducing substantive sentence to 6 months rigorous imprisonment and reducing the default sentence to two months will be sufficient and that will meet the ends of justice. So the sentence is modified as follows:

The appellant is sentenced to undergo rigorous imprisonment for six months and also to pay a fine of Rs. One lakh, in default to undergo simple imprisonment for two months.

In the result, the appeal is allowed in part. The order of conviction is converted under section 8(1) instead of 55(a) of the Abkari Act as done by the court below and fine of Rs. One lakh imposed is confirmed. The substantive sentence

and default sentence are set aside and modified as follows:

The appellant is sentenced to undergo rigorous imprisonment for six months and also to pay a fine of Rs. One lakh in default to undergo simple imprisonment for two months. Set off is allowed for the period of detention already undergone by him under section 428 of the Code.

With the above modification of the sentence and conversion of the conviction, the appeal is allowed in part and disposed of accordingly.

Sd/-

K. RAMAKRISHNAN, JUDGE.

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/true copy/

P.S to Judge

