IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 21ST DAY OF DECEMBER 2015/30TH AGRAHAYANA, 1937

CRL.A.No. 1127 of 2005 ( )

SC 136/2001 of ADDL.DISTRICT COURT (ADHOC), KASARAGOD

APPELLANT(S)/ACCUSED::

T.DAMODARAN
AGED 42 YEARS, PAYYANADUKKAM, KARADUKKA VILLAGE
KASARGOD.

BY ADV. SRI.I.V.PRAMOD

RESPONDENT(S)/COMPLAINANT::

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

BY PUBLIC PROSECUTOR SHRI. JIBU P. THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 21-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SKV

K.RAMAKRISHNAN, J.

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Crl. Appeal No. 1127 OF 2005

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Dated this the 21st day of December, 2015

JUDGMENT

The case of the accused in SC 136/2001 on the file of the Additional Sessions Court (Adhoc-I) Kasaragod is the appellant herein. The appellant was charge sheeted by the Excise Inspector of Badiadka in Crime No.11/2000 of that Excise Range under Section 55(a) of the Abkari Act (ought to be under Section 8(1) and (2) of the Abkari Act).

2. The case of the prosecution in nutshell was that on 9.5.2000 at about 3.30 pm, the accused was found to be in possession of 5 litres of arrack near the house of one Janaki situated at Payyanadkam Karadka village 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 (ought to be under Section 8(1) and (2) of the Abkari Act.

3. After investigation, final report was filed by the investigating officer before the Judicial First Class

Magistrate's Court Kasaragod, where it was taken on file as CP 342/2000. After complying with the formalities, the learned Magistrate committed the case to the Sessions Court, Kasaragod under Section 209 of the Code of Criminal Procedure (hereinafter referred to as the Code). After committal, the Sessions Court took cognizance of the case as SC 136/2001 and thereafter it was originally made over to Assistant Session's Court Kasaragod for disposal and thereafter the case was withdrawn by the learned Sessions Judge and made over to Additional Sessions Court-I, Kasaragod for disposal.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 same was read over and explained to him and he pleaded not guilty. In order to prove the case of the prosecution, PWs1 to 5 were examined and Ext.P1 to P6 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 and he has been falsely implicated in the case. Since the 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 evidence 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 three months and also to pay a fine of Rs.1,00,000/- in default to undergo rigours imprisonment for one moth more. Set off was allowed for the period of detention already undergone 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 Shri. I.V. Pramod, counsel appearing for the appellant and Shri. Jibu P. Thomas learned Public Prosecutor appearing for the State.

6. The counsel for the appellant submitted that detection in this case was done by Assistant Excise Inspector who is not an Abkari Officer and as such the detection in not invalid and conviction based on such detection is not proper and he is entitled to get acquittal. He had relied on the decision reported in Subramaniyan v State of Kerala [2010 (2) KLT 470] in support of his case.

7. On the other hand, the learned Public Prosecutor submitted that the Assistant Excise Inspector is also exercising all the powers of the Excise Inspector and as such the detection made by him is proper as investigation and final report filed by the Excise Inspector who is a competent officer under the Act. Further the Assistant Excise Inspectors were declared as Abkari Officers as per notification SRO 361/2009 dated 8.5.2009 and as such the conviction is proper.

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

On 9.5.2000 while PW1 the Assistant Excise Inspector along with PW2 were doing patrol duty, when they reached the place of occurrence, they saw the accused coming with MO1cannas. On seeing the excise party, he tried to move away from the place. Getting suspicion about his contact, they stopped him and on verification of MO1 cannas, they were satisfied that it contained five litres of arrack. Thereafter PW1 took sample from the contraband liquor and sealed the same and affixed label containing the signatures of himself and witnesses and the accused and sealed the cannas also in the same fashion and seized the same as per Ext.P1 mahazar in the presence of PWs3 and 5. He arrested the accused and prepared Ext.P2 arrest memo. He came to Excise office and registered Ext.P3 crime and occurrence report as Crime No.11/2001 against the accused for the offence under Section 55(a) of the Abkari Act. He prepared Ext.P4 property list and produced the same before court along with contraband articles. He produced the accused before the court along with remand report. He sent Ext.P5 forwarding note with request to send the sample for analysis and the sample was sent from court and Ext.P6 chemical analysis report obtained. PW1 came to excise office and produced the articles and accused before PW4 the Excise Inspector. The investigation in this case was conducted by PW4 the Excise Inspector who registered the crime and produced the crime before Court. He questioned the witnesses and recorded their statement and he completed the investigation and submitted final report.

9. As regards arrest and seizure is concerned, PWs 3 and 5 the independent witnesses to seizure who did not support the case of the prosecution. Both of them admitted that they knew the accused. But they denied having seen the arrest or seizure of the contraband articles from the possession of the accused and they have further stated that they have signed the document as requested by the excise officials. So their evidence is not helpful to prove the case of the prosecution and they were trying to help the accused and that was the reason why they were not supporting the case of the prosecution.

10. Then the evidence available is that of PWs1 and 2, the Assistant Excise Inspector who detected the crime and PW2 the preventive officer who accompanied him. Both of them have deposed in tune with the transaction mentioned in Ext.P1 mahazar. Though they were cross examined at length, nothing was brought out to discredit their evidence on this aspect. So it can be safely concluded that the prosecution has proved that PW1 had arrested the accused along with MO1 cannas said to be contained arrack. The articles in this case were produced before court on the same day and forwarding note contained the specimen seal impression of the seal used by PW1 for sealing the article as well. So there is no possibility of tampering.

11. But in this case the detection was done by an Assistant Excise Inspector who is not an Abkari Officer under the Act at the relevant time. Assistant Excise Inspector were conferred with the power of Abkari Officers only by virtue of notification SRO 361/2009 dated 8.5.2009.

12. In the decision reported in Subramaniyan v State

of Kerala [2010 (2) KLT 470], the powers of Assistant Excise Inspector to exercise the powers of Excise Inspector was considered and this court has held that unless a notification has been issued by the Government authorizing the Assistant Excise Inspectors to exercise all the powers of Excise Inspector, they cannot be deemed to be Abkari Officers for the purpose of exercising the powers of Excise Inspector and any act done by him including detection and investigation is vitiated and no conviction can be based on the basis of such detection.

13. The question regarding the retrospective operation of notification empowering the Assistant Excise Inspectors as Abkari officers was considered by this court in the decision reported in Sasidharan v State of Kerala [2012 (2) KLT 392] and this court has held that no retrospective operation can be given validating the act done by Assistant Excise Inspector prior to 5.8.2009 when alone as per SRO 361/2009 they have been vested with the power of Abkari Officers and declaring them as Abkari Officers to exercise

all the powers of the Abkari Officers under the Act and any detection made by such officers prior to this notification is nonest in the eye of law and no conviction can be based on such detection.

14. In this case the detection was made by an Assistant Excise Inspector who was not an Abkari Officer at the relevant time and in view of the dictum laid down in the above decision, the detection made by the Assistant Excise Inspector who was not an Abkari Officer at the relevant time is bad in law and no conviction can be based on such detection and this aspect has not been considered by the court below before finding the accused guilty for the offence alleged and consequential conviction entered by the court below in this regard is unsustainable in law and the same is liable to be set aside and the appellant is entitled to get acquittal of the charge levelled against him giving of the above benefit.

15. In view of the finding, that appellant is entitled to get acquittal, the sentence imposed is also not proper, 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 and the appellant is acquitted of the charge levelled against him giving him the consequential benefit of detection by an incompetent officer in view of the dictum laid down in the decision cited supra. 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 for that purpose before that court.

Office is directed to communicate this judgement to the court below at the earliest.

Sd/-
K.RAMAKRISHNAN, JUDGE

SKV