

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 31ST DAY OF AUGUST 2015/9TH BHADRA, 1937

CRL.A.No. 1210 of 2005 ()

**S.C.NO.485/2003 of ADDITIONAL DISTRICT AND SESSIONS JUDGE, FAST TRACK
COURT NO. 1, (ADHOC), MANJERI.**

C.P.NO. 85/2003 of JUDICIAL FIRST CLASS MAGISTRATE, NILAMBUR.

APPELLANT/ACCUSED NO.1:

**AYYAPPAN, S/O.SANKARAN,
AMBAZHATHODIKA HOUSE,
MAYILADIPOTTI, AKAMPADAM,
NILAMBUR, MALAPPURAM DISTRICT.**

BY ADV. SRI.BABU S. NAIR

RESPONDENT(S):

**THE STATE OF KERALA, REPRESENTED
BY THE SUB INSPECTOR OF POLICE,
NILAMBUR POLICE STATION-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 31-08-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

skr

K. RAMAKRISHNAN, J.

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Crl. Appeal No. 1210 of 2005

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Dated this the 31st day of August, 2015

JUDGMENT

The first accused in S.C.No.485 of 2003 on the file of the Addl. Sessions Court (Fast Track – 1), Manjery is appellant herein. The appellant along with another person was charge sheeted by the Sub Inspector of Police, Nilambur Police Station in crime no. 57/2003 of Nilambur Police station under Section 55(a) of Abkari Act. The case of the prosecution in nutshell was that on 01.12.2001 at about 8.15 a.m , the accused persons were carrying 15 Liters of arrack in a Motor cycle with no. KL-10 /K 6678 driven by the 1st accused with 2nd accused as a pillion rider who was holing the contraband article in violation of the provisions violation of Abkari Act and thereby they have committed the offences punishable under Section 55(a) of Abkari Act.

2. After investigation, final report was filed against the

accused persons including the appellant when he appeared before the Judicial First Class Magistrate Court, Nilambur. The learned Magistrate had committed the case to Sessions Court, Manjery as per order in C.P.No. 85 of 2003 under Section 209 of Code of Criminal Procedure (hereinafter called 'the Code') and the Sessions Judge had taken cognizance of the case a S.C.No.485 of 2003. Thereafter, it was made over to Addl. Sessions Court (Adhoc -I), Manjeri, for disposal.

3. When the accused appeared before the court below after hearing both sides, charge under Section 55(a) of Abkari Act was framed against both accused and the same was read over and explained to them and they pleaded not guilty. In order to prove the case of the prosecution, PWs 1 to 11 were examined and Ext. P1 to P16, P4(a), P5(a), P10 (a) and MO 1 to MO 3 were marked on this side. After closure of the prosecution evidence, the accused were

questioned under Section 313 of the Code and they denied all the incriminating circumstances brought against them in the prosecution evidence. They have further stated that they had not committed any offence and they were falsely implicated in the case. Since evidence in this case did not warrant an acquittal under Section. 232 of the Code, the accused were called upon to enter on their defence. But no defence evidence was adduced on their side. After considering the evidence on record, the court below found the 2nd accused not guilty for the offence alleged and acquitted him of that charge giving him benefit of doubt under Section 335(1) of the Code. But the Addl. Sessions Judge found the appellant/1st accused guilty under Section 55(a) of Abkari Act and convicted him thereunder and sentence him to under go rigorous imprisonment for 3 years and also to pay a fine of Rs. 1 Lakhs. In default to undergo simple imprisonment for one year. Set off was

allowed for the period of detention undergone by him under Section 428 of the Code Aggrieved by the same, the above appeal has been preferred by the appellant/1st accused before the court below.

4. Heard Sri.Renjith representing Sri. Babu S Nair, counsel for the appellant and Public Prosecutor, Smt. Seena Ramakrishanan appearing for the State.

5. Learned counsel for the appellant submitted that there was no proper identification of the accused in this case. The court below did not accept the evidence of the prosecution witnesses to prove the identity of the 2nd accused but at the same time relied on their evidence for convicting the 1st accused for the offence alleged which is not proper. Further there was delay upto 7 days in producing the article before the court. There is no proper explanation forthcoming from the side of the prosecution witnesses for the delay in producing the article and also

the reason for delay and who was in possession of the article till it was produced in court so as to come to the conclusion that the article seized were the same articles produced in the court and the analysis report represents the sample alleged have been taken from the contraband articles seized from the possession of the accused. Further there is nothing to connect the 1st accused with the vehicle except producing the search list by which the registration certificate was said to have been seized. He was not the registered owner of the vehicle. Further person who was examined also did not prove ownership of the vehicle and also to whom the vehicle was sold etc. So under the circumstances, the court below was not justified in convicting the appellant for the offence alleged and he is entitled to get acquittal.

6. On the other hand the learned Public Prosecutor submitted that the evidence of Pw2 proved the identity of

the accused as a person who drove the vehicle at the relevant time. Further the seizure of the registration certificate of the vehicle was made from the house of the 1st accused who is the appellant herein which will go to show that he was in possession of the vehicle at the relevant time when the offence was detected and as such the court below was perfectly justified in coming to conclusion, he was driving the vehicle at the relevant time. The delay in producing the article is not material in this case and no prejudice has been caused. According to the learned Public Prosecutor, prosecution has proved the case against the 1st accused beyond the reasonable doubt and court below was perfectly justified in convicting the 1st appellant for the offence alleged.

7. The case of the prosecution as emerged from the prosecution witness was as follows. On 01.02.2003 at about 8.15 a.m while PWs 1 and 2 along with police party

were doing the patrol duty and when they reached Veliyamkode, they saw two persons coming in a motor vehicle with no. KL.10 K 6678 with the pillion rider carrying a sack in his hand from Akambadam side. When they reached the place of occurrence on seeing the jeep, they did not stop the vehicle though they wanted to stop the same. So they chased the vehicle. But after going to some distance they abandoned the vehicle and the contraband article and left the place. Though they chased them, they could not catch them. So they came back and examined the sack and found it contained 3 kannases, one having 10 liters capacity and two having 5 liters capacity with full of liquid and on examination it was revealed that it was arrack. So they seized the same and Pw 1 took sample from the liquid in 3 kannases in 375 ml bottles and sealed the sample bottles and the kannases and labeled the same and seized the same as per Ext.P1 Mahazar in the presence

of Pws 3 and 4. Thereafter they came to the police station and he registered Ext.P2, First Information Report as crime no.57/2003 of Nilambur Police Station, under Section 55(a) of Abkari Act against identifiable two persons travelled in scooter with no. KL-10/K 6678.

8. Thereafter as per the instructions of the Circle Inspector of Police, he conducted preliminary investigation, he sent Exp.P4 and P4(a) search memorandums to court for the purpose of conducting search in the house of the accused nos. 1 and 2 and conducted search on their house on the same day and found the registration certificate of the vehicle involved in the case in the house of 1st accused which was seized as per Ext.P5 search list, in the presence of Pw 8, the wife of the 1st accused and another. Ext.P5(a) is the search list in respect of search of 2nd accused but no incriminating articles seized from his house. He prepared Ext.P6 Property list, and forwarded the same along with

Ext.P8 registration certificate of the Vehicle to Court. During the investigation, it was revealed, the accused nos. 1 and 2 had committed the crime. He gave Ext.P9 report to add name and address of the accused persons. Thereafter the investigation was conducted by PW 11, he questioned PW 1, the registered owner of the vehicle. He obtained Ext.P18 Chemical Analysis Report and laid final report in the case.

9. Pws 3 and 4 are the attestors to Ext.P1 seizure mahazar. They had admitted their signature in Ext.P1 and also in away admitted that they signed the mahasar on getting information of the police that it was prepared for seizing arrack which was said to have been taken in the Motor cycle found there. But they have denied having seen the motor vehicle driven by any person. So their evidence is not helpful to prove the identity of the appellant as the person who drove the vehicle at the relevant time. Pws 1

and 2 are the official witnesses. Pw1 is the detecting officer and also conducted major portion of the investigation. Pw 2 is the police officer who was accompanied by Pw1 and witnessed the seizure. They also deposed that when they were doing patrol duty, they saw two persons coming in a motor cycle and though they wanted to stop the same, they did not stop and they proceeded towards Edakkara side in a suspicious manner and so they chased the vehicle, but they could not catch hold of the accused persons who drove the vehicle and the pillion rider carrying MO 3 sack, as they ran away after abandoning the vehicle with the contraband articles. Thereafter they came back and seized the article after taking sample and sealing the same as per Ext.P1 mahazar and came to police station and registered Ext.P2 first information report against the identifiable persons who were traveling in the motor cycle. It is seen from the evidence that even at the time when the search was

conducted, there was no clue regarding the person who drove the vehicle or travelled in the vehicle as a pillion rider carrying the contraband article in the sack. Though PW2 had stated that he could identify the persons and later they identified the accused persons from police station, it will be seen from the evidence of the Pw11 Investigating Officer that there is nothing on record to show that the accused persons were summoned to the police station on giving notice, and there is nothing on record to show that the witnesses were summoned and thereafter they identified the accused persons from the police station. Further the court below did not accept the evidence of the prosecution witnesses regarding the identity of the 2nd accused who was alleged to have been traveling in the vehicle with the contraband article as pillion rider and acquitted him on the ground of non identification of that accused as a person who was traveling in the vehicle as a

pillion rider. So under the circumstances, the identification alleged to have been done by the official witnesses of the 1st accused who is the appellant who was allegedly driving the vehicle at the relevant time also cannot be believed as the same yard stick applied to 2nd accused will be applicable to this accused also regarding his identification as a person who drove the vehicle at the relevant time.

10. Then the other evidence connecting the 1st accused with the vehicle was Ext.P8 registration certificate which was alleged have been seized from the house of the 1st accused as per Ext.P5 search list in which Pw8 his wife was a witness. It is true that Pw8 and Pw9 have stated that the 1st accused was having a motor cycle. But they did not mention the registration no. of the motor vehicle. Further there is no evidence forthcoming from the side of the prosecution from where, they come to know that the 1st accused was having the registration certificate of the

vehicle and on the basis of which, the search was conducted in his house and seized the registration certificate as well. Further Pw10 was examined to prove that he had sold the vehicle, but his evidence is also not helpful to prove that it was sold to 1st accused. Even assuming that he was the owner of the vehicle by transfer without effecting transfer in the registration certificate of the vehicle, that alone is not sufficient to come to the conclusion that he was driving the vehicle at the relevant time so as to connect him with the contraband article. Since there was no identification of the 1st accused as the person who drove the vehicle at the relevant time, mere seizure of Ext.P8 registration certificate alone is not sufficient to prove that he was riding the vehicle with the contraband article at the relevant time and that benefit must be given to him which the court below had not properly appreciated and given in favour of the appellant.

11. Further the articles were seized on 01.02.2003. But it reached the court on 07.02.2003. Pw1 had categorically stated that he had entrusted the same to the writer for forwarding the same to the court. But he did not know the reason for delay. He was also not sure as to who was in possession of the article till it was produced in the court. The writer to whom it was entrusted was not examined as well. In the decision reported in Ravi Vs State of Kerala (2011 (3) KLT 353) , this court has observed that the delay in producing the seized article is not always fatal. But it must be proved by the prosecution that it was produced in the court in a tamper free condition and it must be proved that who was in possession of the article till it was produced in the court. In the absence of proper explanation for the delay then there is a doubt regarding the nature of article produced before the court and it cannot be said that the articles that were seized were the

same articles that were produced in court and the Chemical Analysis Report relates to the representative sample alleged to have been taken from the contraband articles alleged to have been seized from the possession of the accused and the that benefit must be given to the accused.

12.In this case also there is a delay of 7 days in producing the article and there is no explanation given by the prosecution for the delay in producing the article as well. Further the evidence of Pw1 or the investigating officer who laid the charge namely Pw11 is also not helpful to prove as to who was in possession of article till it was produced in the court in a tamper free condition so as to come to the conclusion that the chemical analysis report obtained relates to the same contraband article which was seized from the possession of the accused which was alleged have been transported by the accused and seized

in his absence in this case. So in the absence of such evidence, it cannot be said that the prosecution has proved beyond reasonable doubt that the appellant was found to be in possession of arrack so as to convict him the offence alleged and that benefit must be given to the accused. The court below had not considered these aspects before coming to the conclusion that the prosecution had proved beyond reasonable doubt that the appellant had committed the offence punishable under Section 55(a) of Abkari Act and the consequential conviction entered by the court below, for the reasons mentioned above, is unsustainable in law and the same is liable to be set aside. The appellant is entitled to get acquittal of the charge leveled against him giving him the benefit of doubt.

13. In view of the findings that the prosecution has failed to prove the guilt of the appellant, and he is entitled to get acquittal, the sentence imposed by the court below

is also improper 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 Abkari Act are hereby set aside. The appellant is acquitted of the charge leveled against him giving him the benefit of doubt. He is set at liberty . Bail bond executed by him will stand cancelled. The lower court is directed to refund the fine amount, if any deposited by the appellant, to him on making necessary applications for this purpose. Office is directed to communicate this judgment with the court below at the earliest.

Sd/-
K. RAMAKRISHNAN,
JUDGE.