

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 26TH DAY OF OCTOBER 2015/4TH KARTHIKA, 1937

CRL.A.No. 1578 of 2004 ( )

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AGAINST THE JUDGMENT IN SC 256/2004 of ADDITIONAL SESSIONS COURT  
(ADHOC-I), ERNAKULAM, DATED 31-08-2004

&

AGAINST THE ORDER/JUDGMENT IN CP 86/2003 of J.M.F.C., PERUMBAVOOR.

APPELLANT(S)/ACCUSED:

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SABU, S/O.SREEDHARAN,  
CHERUVALLIPADIYIL (THONDUMALIL), ARUVAPARA,  
KOZHIKOTTUKULANGARA, VENGOOR VILLAGE,  
KUNNATHUNADU TALUK.

BY ADVS.SRI.N.ANILKUMAR  
SRI.K.R.RAJAGOPALAN NAIR (PERUMBAVOOR)

RESPONDENT(S)/COMPLAINANTS:

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1. STATE OF KERALA,  
REPRESENTED BY PUBLIC PROSECUTOR,  
HIGH COURT OF KERALA, ERNAKULAM.
2. EXCISE INSPECTOR, PERUMBAVOOR.

BY PUBLIC PROSECUTOR SMT.SEENA RAMAKRISHNAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 26-10-2015,  
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**K. RAMAKRISHNAN, J.**

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Crl. Appeal No.1578 of 2004

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Dated this the 26<sup>th</sup> day of October, 2015

**JUDGMENT**

Accused in S.C.No.256/2004 on the file of the Additional Sessions Court (Adhoc-I), Ernakulam, is the appellant herein. The appellant was charge-sheeted by the Excise Inspector, Perumbavoor, in Crime No.7/2001 of that range under Section 55(a) of Abkari Act.

2. The case of the prosecution in nut shell was that, on 27.06.2001 at about 12.30 p.m., from the rubber estate on the western side of the house of Thondumalil Sreedharan at Vakkuvally, the accused was found to be in possession of 5 liters of arrack, in violation of the Provisions of Abkari Act and thereby he had committed the offence punishable under Section 55(a) and Section 8(1) and (2) of the Kerala Abkari Act.

3. After investigation, final report was filed

before the Judicial First Class Magistrate Court, Perumbavoor, and the case was taken on file as C.P.No.86/2003, thereafter it was committed to the Sessions Court, Ernakulam by the learned magistrate under Section 209 of the Code of Criminal Procedure. After committal, the learned Sessions judge had taken cognizance of the case as S.C.No.256/2004 and it was made over to the Additional Sessions Court (Adhoc-I), Ernakulam, for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under Section 55(a) of the Abkari Act (ought to be under Section 8(1) and (2) 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, PWs 1 to 4 were examined and Exts.P1 to P6 were marked on their side. After closure of the prosecution evidence, the accused was questioned under Section 313 of the Code of Criminal

Procedure 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 the case did not warrant an acquittal under Section 232 of the Code of Criminal Procedure, the Additional Sessions Judge directed the accused 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) and Section 8(1) and (2) of the Abkari Act and convicted him thereunder and sentenced him to undergo rigorous imprisonment for three years and also to pay a fine of ₹1,00,000/-, in default to undergo simple imprisonment for three months under Section 55(a) of the Abkari Act and no separate sentence was awarded for the offence under Section 8(1) and (2) of Abkari Act. Aggrieved by the same,

the present appeal has been preferred by the appellant/accused before the court below.

5. Since there was no representation on 09.10.2015, the case was posted to 13.10.2015 in the disposal list. Even on that day there was no representation. So Legal Aid Counsel was provided to the appellant and Smt. Sherly S.A. was appointed as Legal Aid Counsel.

6. Heard Smt. Sherly S.A., Legal Aid Counsel and Smt. Seena Ramakrishnan learned Public Prosecutor appearing for the State.

7. Legal Aid Counsel has vehemently argued that independent witnesses to the seizure turned hostile and the evidence of PWs 1 and 2, the official witnesses alone is not sufficient to convict the accused as their evidence is not believable. There was no spot sample taken and produced along with the property list as well. So it cannot be said that Ext.P2 chemical analysis report relates

to the representative sample said to have been taken from the contraband article seized so as to convict the accused for the offence alleged. So according to the learned counsel, the conviction entered by the court below is unsustainable in law and the same is liable to be set aside.

8. On the other hand, Learned Public Prosecutor submitted that court below had appreciated the evidence properly and came to the conclusion that the accused had committed the offence and the conviction is proper and no interference is called for.

9. The case of the prosecution as emerged from the prosecution witnesses was that, on 27.06.2001 at about 12.30 p.m., while PW1 was doing patrol duty along with excise party and when they reached the place of occurrence, they saw the accused coming with MO1 kannas in his hand and on seeing the excise party he tried to go away from that place, so they stopped him and PW1 took

the kannas from his hand and examined the contents of the kannas and found that it contained five liters of some liquid which when further examination by smelling and tasting he was satisfied that it was arrack. So he arrested the accused and prepared Ext.P2 arrest memo and it was produced along with the property list as well. He sealed the kannas and affixed label and seized the same as per Ext.P1 mahazar in the presence of PWs 2 and 3. Thereafter he came to excise office along with the accused and the contraband article and registered Ext.P4 crime and occurrence report as crime No.7/2001 of Perumbavoor Excise Range under Section 55(a) and Section 8(1) and (2) of Abkari Act. He produced the accused along with remand report and he produced the contraband articles seized before court along with Ext.P5 property list. He sent Ext.P6 forwarding note with request to send the sample for analysis and the sample was sent from court and Ext.P3

chemical analysis report obtained. Investigation in this case was conducted by PW4. He questioned the witnesses and recorded their statements and he collected Ext.P3 chemical analysis report and completed the investigation and submitted final report.

10. PWs 2 and 3 were the independent witnesses to the seizure. Though they admitted their signatures in Ext.P1 mahazar, they denied having seen the actual seizure and arrest of the accused. So it is clear from this that now they are trying to help the accused and that was the reason why they are not supporting the case of the prosecution.

11. Then the available evidence is that of PW1, the detection officer alone is to prove the seizure. According to him, he was doing patrol duty along with the excise party on that day and when he reached the place of occurrence, he saw the accused coming through the rubber plantations with MO1 kannas in his hand and on seeing the

excise party, he tried to go away from that place. So he stopped him and on examination of the kannas, he found that it contained full of liquid namely 5 liters. On further examination he was satisfied that it was arrack. He sealed the same and affixed label and seized the same as per Ext.P1 mahazar. Though he was cross examined at length nothing was brought out to discredit his evidence on this aspect. So the court below was perfectly justified in coming to the conclusion that the accused was arrested by PW1 along with MO1 kannas said to be containing arrack.

12. Mere arrest of the accused with some liquid said to be arrack alone is not sufficient to come to the conclusion that the prosecution has proved the case against the accused and he was in possession of arrack. The prosecution has further to prove the link between the accused and the contraband article seized. Unless this link is established it cannot be said that prosecution has brought

home the complicity of the accused in the commission of the offence. Further the prosecution also has to prove that the chemical analysis report relates to the representative sample said to have been taken from the contraband articles seized. Unless this is established, it cannot be said that prosecution has proved beyond reasonable doubt that the accused was found to be in possession of arrack so as to convict him for the offence under Section 55(a) or under Section 8(1) and (2) of Abkari Act.

13. In the decision reported in **Sasidharan v. State of Kerala (2007(1) KLT 720)**, it has been held that, prosecution has a duty to prove that it was the sample taken from the contraband liquor seized from the possession of the accused which had reached the hands of chemical examiner in a full proof condition. It is further held in the same decision that the committing magistrate has to take care that contemporary proceedings evidencing the

drawing of sample and sending the same to chemical examiner in a tamper proof condition are recorded in the proceedings before court. Sessions Judge trying such cases also should ensure that the concerned member of the staff who had drawn the sample and dispatched the same to the chemical examiner duly packed and sealed under the covering letter of the magistrate is examined before court during trial. The Public Prosecutor in charge of the case also had a duty to file an additional witness list for examining the 'thondy section clerk' (property clerk) concerned so as to examine the nexus between the contraband substances from the accused.

14. In this case though PW1 was cross examined had stated that he had drawn sample and sealed the same and produced before the court along with property list, such a procedure adopted was not found a place in Ext.P1 mahazar which is the contemporary document prepared by

the excise inspector/ detecting officer while seizing the contraband article. Further in Ext.P5 property list also no sample was produced along with MO1 kannas. It is true that Ext.P4 forwarding note shows that the sample was taken and it was sent with a request to send the same for chemical analysis. There is no evidence to show from where it was taken and who had taken the same as well. If the kannas was sealed from the place of occurrence while seizing the same as per Ext.P1 mahazar, then if any tampering has been done in the kannas will be without the connivance of the court and then, it cannot be said that it was produced before court in a tamper free condition. In this case there is no evidence to prove that the sample mentioned in Ext.P3 chemical analysis report was taken from the spot or from the court under the orders of the concerned magistrate. So under the circumstances, it cannot be said that prosecution has proved beyond

reasonable doubt that Ext.P3 chemical analysis report relates to the representative sample said to have been taken from the contraband article alleged to have been seized from the possession of the accused so as to come to the conclusion that prosecution has proved beyond reasonable doubt that the accused was found to be in possession of arrack so as to convict him for the offence under Section 55 (a) or Section 8(1) and (2) of the Abkari Act. These aspects were not considered by the court below before coming to the conclusion that the prosecution has proved the case against the accused and consequential conviction entered by the court below against the appellant for the offence alleged is unsustainable in law and the same is liable to be set aside and he is entitled to get acquittal giving him the benefit of doubt. In view of the finding that the accused is entitled to get acquittal, the sentence imposed is also not proper 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) and Section 8(1) and (2) of the Abkari Act are hereby set aside and the appellant is acquitted of the charge levelled against him giving him the benefit of doubt. He is set at liberty. The bail bond executed by him will stand cancelled. The fine amount if any remitted by the appellant is directed to be refunded to the appellant by the court below on making necessary application for that purpose before that court.

Office is directed to communicate this judgment to the concerned court, immediately.

Sd/-

**K. Ramakrishnan, Judge**

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*P.A. to Judge*