

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

TUESDAY, THE 17TH DAY OF NOVEMBER 2015/26TH KARTHIKA, 1937

CRL.A.No. 1579 of 2004 ()

AGAINST THE JUDGMENT IN SC 579/2000 of ADDL.SESIONS COURT (ADHOC)-II,
THALASSERY DATED 17.9.2004

APPELLANT/ACCUSED::

P.A.VASU, AGED 80 YEARS,
S/O. AYYAPPAN, KOLATHUVAYAL,
THIRUMENI AMSOM
PARAPOYIL DESOM,
TALIPARAMBA TALUK, KANNUR.

BY ADVS.SRI.M.SASINDRAN
SRI.M.B.PRAJITH

RESPONDENT/RESPONDENT::

STATE - REP. BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.JIBU P.THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 17-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. RAMAKRISHNAN, J.

.....
Crl.A.No.1579 of 2004

.....
Dated this the 17th day of November, 2015

JUDGMENT

The accused in S.C.No.579/2000 on the file of the Additional Sessions Court, Adhoc-II, Thalassery is the appellant herein. The appellant was charge sheeted by the Excise Inspector, Payyannur excise range in Crime No.68/1997 of that excise range under section 55(a) of the Abkari Act.

2. The case of the prosecution in nutshell was that, on 20.10.1997, at about 12.30 noon, at a place called Kolathuvayi, in propoyil desom, Thirumeni amsom, on the side of the road running between prapoyil-peruvattam, in front of the tea shop of the accused, the accused was found to be in possession of one litre of arrack in a 2.5 litre can, and thereby he had committed the offence punishable under section 55(a) of the Abkari Act (ought to be under section 8(1) of the Abkari Act).

3. After investigation, final report was filed before the Judicial First Class Magistrate Court, Payyannur where it was taken on file as C.P.No.137/2000. After complying with the formalities, the learned Magistrate committed the case to the Sessions Court, Thalassery as per section 209 of the Code of

Criminal Procedure (hereinafter referred to as 'the Code'). After committal, the case was taken on file by the Sessions Court as S.C.No.579/2000 and it was originally made over to the Assistant Sessions Court, Payyannur for disposal. Thereafter it was withdrawn by the Sessions Court and made over to the Additional Sessions Court, Adhoc-II, Thalassery for disposal.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 (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 4 were examined and Exts.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 no article was seized from his possession and he has been falsely implicated in the case. Since 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 he was convicted thereunder and sentenced him to undergo rigorous imprisonment for one year and also to pay a fine of Rs. One lakh, in default to undergo simple imprisonment for three months more. Set off was allowed for the period of detention already undergone under section 428 of the Code under section 428 of the Code. Aggrieved by the same, the present appeal has been preferred by the appellant/accused before court below.

5. Heard Sri. M. Saseendran, counsel appearing for the appellant and Sri. Jibu P. Thomas, Public Prosecutor appearing for the State.

6. Counsel for the appellant submitted that there is delay of one day in producing the article, which has not been properly explained. Further the specimen seal impression was not produced and there is no explanation forthcoming for the same and that benefit must be given to the accused. He had relied on the decision reported in **Krishnan v. State** (2015 (1) KHC 822) in support of his case.

7. On the other hand, Public Prosecutor submitted that there was no delay in producing the article and chemical

analysis report shows that the sample seal provided tallied with the seal seen on the bottle. So there is no possibility of tampering and there is no need to interfere with the conviction entered by the court below.

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

On 20.10.1997, at about 12.30 p.m while PW1, Excise Inspector was doing patrol duty along with excise party, they found the accused standing in front of the tea shop of the accused on the side of the road with MO1 can in his hand and on seeing the excise party, he tried to go away from the place. So they stopped, him and on examination of MO1 can which is having the capacity of 2.5 litres, it contained liquid having volume of one litre.

9. PW1 had examined the contents of the can. He was satisfied that it was arrack. So he arrested the accused and prepared Ext.P2 arrest memo and intimated the same to the wife of the accused. He took sample from the liquid seen in the can and sealed the same and affixed label containing signature of himself and the accused and also sealed and labeled MO1 can also in the same manner and seized the same as per Ext.P1

mahazer in the presence of PW2 and another. He came to the excise office along with the accused and the contraband article seized and registered Ext.P3 crime and occurrence report against the accused as Crime No.68/1997 of Payyannur excise range under section 55(a) of the Abkari Act. He produced the accused before court on the same day along with the remand report. He produced the articles along with forwarding note on the same day. He sent Ext.P5 forwarding note with a request to send the sample for analysis and sample was sent from court to chemical examiner's laboratory and Ext.P6 chemical analysis report obtained, which shows that the sample contained 23.61% by volume of ethyl alcohol. Investigation in this case was conducted by PW4. He went to the place of occurrence and questioned the witnesses and recorded their statements. On the basis of his request, PW3 Village Officer prepared Ext.P4 plan of the place of occurrence. He collected Ext.P6 chemical analysis report and produced the same before court. He completed the investigation and submitted final report.

10. PW2, an independent witness, to the seizure though admitted his signature in Ext.P1, he denied having seen the

seizure. He had further stated that at the time when he signed Ext.P1, he did not find the accused there. So it is clear from this that he is now trying to help the accused and that was the reason why he is not supporting the case of the prosecution. He had also admitted that he had sign the mahazer from the side of the road. He had also admitted that the excise party had come to the place at that time.

11. Then the evidence available is that of PW1, the detecting officer. He had categorically stated that on 20.10.1997 he was doing patrol duty and when he reached the place of occurrence, he saw the accused in front of the tea shop coming with MO1 can in his hand and on seeing the excise party, he tried to go way and so he stopped him, verified the can and he was satisfied that it contained one litre of arrack. After complying with the formalities, sample was taken, sealed the same and affixed label and he seized the same as per Ext.P1 mahazer. He arrested the accused and came to the excise office and registered case. Though he was cross examined at length, nothing was brought out to discredit his evidence on this aspect. So under the circumstances, even though independent witnesses turned hostile, the court below

was perfectly justified in relying on the evidence of Pw1 for relying on the conclusion that the accused was arrested with MO1 can said to be containing arrack.

12. It is seen from the evidence of PW1 that articles were produced before court on the same day and the accused was also produced before court on the same day along with remand report which is evident from the property list and remand report. Further, no question was put to PW1 regarding non production of the specimen seal impression to the investigating officer before court. It will be seen from Ext.P6 chemical analysis report that the seal seen on the bottle was in tact and found tallied with the sample seal provided. That indicates that the sample seal was provided along with the forwarding note which was satisfied to be in tact. Since articles were produced before court on the same day without delay, there is no possibility of tampering the article so as to come to the conclusion that the articles produced before court were not articles which were said to have been seized from the possession of the accused.

13. It is true that in the decision reported in **Krishnan's case** (cited supra) it has been observed that non production of

the sample seal and not affixing sample seal in the forwarding note is fatal and that benefit must be given to the accused. But in that case seizure was found to be doubtful as one of the witnesses to the seizure was cited as witness and he was not examined also. Further, questions were put to the detecting officer and the investigating officer regarding non obtainment of the specimen seal impression or verification of the specimen seal used for sealing the articles. Those circumstances were actually taken into effect and this Court has found that under such circumstances non production of the specimen seal impression is also fatal and that benefit must be given to the accused. But in this case, the entire articles were produced before court without delay on the same day of seizure and there is no possibility for tampering articles as well. So under the circumstances, the dictum laid down in the above decision is not applicable to the facts of this case. So from the circumstances and also on the basis of the evidence available on record, the court below was perfectly justified in coming to the conclusion 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) of the Abkari

Act though court below had convicted him under section 55(a) of the Abkari Act. So conviction entered by the court below for possession of arrack though under section 55(a), (which out to have been under section 8(1) of the Abkari Act), of the Abkari Act does not call for interference.

14. Counsel for the appellant submitted that the accused is aged 76 years at the time when the offence was committed and he will be much more older now and he prayed for leniency. The court below had sentenced the appellant to undergo rigorous imprisonment for one year and also to pay a fine of Rs. One lakh, in default to undergo simple imprisonment for three months. It is seen from the records that the accused was aged 76 years at the time when he was examined in court. The sentence was pronounced on 17th September, 2004 . He must be more than 87 years more. It is true that persons who are committing crime of this nature are doing the same knowing that they are committing the offence and showing undue leniency in such cases will only sent a wrong signal to the society and it will cause lose of confidence to the public in the system. But, at the same time, while considering the sentence, court can consider antecedents, age and background of the

accused and possibility of reformation etc. In this case, accused is more than 76 years at the time when the offence was committed. The prosecution has no case that he had involved in any other crime as well. There is no possibility of accused in committing similar offence in future. These things can be taken as a mitigating circumstance to show leniency and reducing the sentence. So considering the circumstances, this Court feels that substantive sentence of 2months simple imprisonment with default sentence of one month simple imprisonment will be sufficient and that will meet the ends of justice. So the substantive sentence of one year rigorous imprisonment and default sentence of simple imprisonment for three months are set aside and the same is modified as follows:

The appellant is sentenced to undergo simple imprisonment for two months and also to pay a fine of Rs. One lakh, in default to undergo simple imprisonment for one month. Set off was allowed for the period of detention already undergone.

In the result, the appeal is allowed in part. The order of conviction passed by the court below though under section 55(a), ought to be under section 8(1)) of the Abkari Act is hereby confirmed and sentence of fine of Rs.One lakh imposed is hereby

confirmed. But the substantive sentence of one year rigorous imprisonment and default sentence of three months simple imprisonment are set aside and the same is modified as follows:

The appellant is sentenced to undergo simple imprisonment for two months and also to pay a fine of Rs. One lakh, in default to undergo simple imprisonment for one month. The period of detention already undergone in this case is set off under section 428 of the Code.

Office is directed to communicate a copy of this judgment to the concerned court at the earliest.

Sd/-

K. RAMAKRISHNAN, JUDGE.

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/true copy/

P.S to Judge

