

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

WEDNESDAY, THE 30TH DAY OF SEPTEMBER 2015/8TH ASWINA, 1937

CRL.A.No. 1260 of 2005 ()

AGAINST THE JUDGMENT IN SC 859/2001 of ADDL. DISTRICT COURT (ADHOC-I),
KOLLAM

APPELLANT/ACCUSED::

SIVANANDAN, S/O.KRISHNAN,
KRISHNA BHAVANAM,
THAZHAVA VADAKKUM MURI,
THAZHAVA VILLAGE,
KARUNAGAPPALLY,
KOLLAM DISTRICT.

BY ADV. SRI.B.MOHANLAL
BY ADV.PREETHA P.S

RESPONDENT/COMPLAINANT::

STATE OF KERALA REP.BY THE
EXCISE RANGE INSPECTOR, KARUNAGAPPALLY EXCISE RANGE,
KOLLAM DISTRICT, THROUGH THE PUBLIC PROSECUTOR
HIGH COURT OF, KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. JIBU P. THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 30-09-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. RAMAKRISHNAN, J.

.....
Crl.A.No.1260 of 2005

.....
Dated this the 30th day of September, 2015.

JUDGMENT

The accused in SC.No.859/2001 on the file of the Additional Sessions Court, Adhoc-I, Kollam is the appellant herein.

2. The appellant was charge sheeted by the Excise Inspector, Karunagappally Excise Range in Crime No.153/1999 of Karunagappally Excise Range under section 55(a) of the Abkari Act, which ought to have been under section 8(1) read with 8(2) of the Abkari Act.

3. The case of the prosecution in nutshell was that on 17.10.1999 at about 8.10 a.m the accused was found to be in possession of one litre of arrack in seven polythene covers of 150 ml each and carrying the same in a plastic kit through Kuttippuram-Manappally road on the eastern side of the house of Udayabhavanam Ravindran in Thazhava Thekkummuri of Thazhava 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, which ought to be under

section 8(1) read with 8(2) of the Abkari Act.

4. After investigation, final report was filed before the Judicial First Class Magistrate Court, Karunagappally where it was taken on file as C.P.No.59/2001. Thereafter it was committed to the Sessions Court, Kollam by the learned Magistrate under section 209 of the Code of Criminal Procedure. After committal, the case was taken on file by the Sessions Court as S.C.No.859/2001 and it was originally made over to the Principal Assistant Sessions Court, Kollam for disposal. Thereafter it was withdrawn and again made over to the Additional Sessions Court, Adhoc-I, Kollam for disposal.

5. When the accused appeared before the court below, after hearing both sides charge under section 55(a) of the Abkari Act (would have been framed under section 8(1) read with section 8(2) 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 5 were examined and Exts.P1 to P5, P2(a) and MO1 were marked on the side of the prosecution. 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 is innocent of the same 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 one year and also to pay a fine of Rs. One lakh, in default to undergo simple imprisonment for six months. Set off was allowed for the period of detention already undergone by him. Aggrieved by the same, the present appeal has been preferred by the appellant/accused before the court below.

6. Heard Smt. Preetha P.S, counsel representing Sri.B. Mohanlal, counsel appearing for the appellant and Sri. Jibu

P.Thomas, Public Prosecutor appearing for the State.

7. Counsel for the appellant submitted that independent witnesses to the seizure did not support the case of the prosecution. Further there was delay in producing the article. The delay has not been explained. Further there is no label affixed on the contraband articles so as to identify the same on a later occasion. There is discrepancy in the evidence of Pws 2 and 3 regarding the manner in which the sampling was done. So under the circumstances, it cannot be said that the prosecution has proved beyond reasonable doubt that the accused had committed the offence and consequential conviction entered is unsustainable in law and he is entitled to get acquittal. Counsel also submitted that the sentence imposed is harsh considering the age of the accused.

8. On the other hand, learned Public Prosecutor submitted that evidence of Pws 2 and 3 coupled with the evidence of PW4 will go to show that seizure and arrest was proved and articles were produced along with the documents on the same day though it was received in court only on 22.10.1999. It only

says that report regarding seizure should be intimated to the court forthwith. Under the circumstances, the finding of guilt of the accused and consequential conviction are just and proper and does not call for interference.

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

On 17.10.1999 at about 10.10 a.m, PW2, the Preventive Officer along with PW4, the Excise Guard and others were doing patrol duty and when they reached the place of occurrence, they saw the accused coming with a plastic cover and on seeing the excise party, he tried to escape from the scene and they stopped him and on verification of the plastic bag, it contained 7 plastic covers containing some liquid of 150ml each and they took two covers and opened the same and verified the same and they were satisfied that it was arrack. They took the liquid from the opened covers in a 375 ml bottle and sealed the same and other covers with arrack and two empty covers which also contained arrack were sealed along with the plastic cover which was identified as

MO1 and seized the same as per Ext.P1 mahazer in the presence of PW1 and CW4. He arrested the accused as per Ext.P2 arrest memo and gave arrest intimation to his wife as per Ext.P2 (a) arrest intimation. Thereafter he came to the excise office and entrusted the same to PW3, the Excise Inspector who registered Ext.P3 occurrence report as Crime No.153/1999 of Karunagappally Excise Range against the accused under sections 55(a), 8(1) and 8(2) of the Abkari Act. He prepared Ext.P4 property list and produced the same before court along with the accused with remand report with a requisition to send sample for analysis on the same day and the accused was remanded to custody. Thereafter the sample was sent from court and Ext.P5 report obtained. Investigation in the case was conducted by PW5, his successor Excise Inspector. He questioned the witnesses and recorded their statements and he completed the investigation and submitted final report.

10. PW1 is the independent witness to the seizure. He denied having seen the seizure and also denied the signature in Ext.P1. But he had stated that house of the accused is

situated near to his house and knew CW4, who is the other witness to Ext.P1 mahazer and he deposed that he is now in Gulf. Since CW4 is in Gulf, he could not be examined. So it is clear from this that PW1 is now trying to help the accused and that was the reason why he is not supporting the case of the prosecution.

11. Then the evidence available is that of Pws 2 and 3, the the Detecting Officer and the Excise Guard who accompanied him. PW2 had deposed that on that day, they were doing patrol duty and at that time they saw the accused coming with MO1 bag in his hand. On seeing the excise party, he tried to escape from the place. So they stopped him and he examined MO1 plastic bag which contained 7 plastic covers with liquid of 150 ml each. He opened two covers and examined the contents of those covers and he was satisfied that it was arrack. He took the liquid in those two covers in 375 ml bottle and sealed the same. He had put the remaining plastic covers with arrack and two empty covers in MO1 cover and sealed the same also. Then he seized all those articles as per Ext.P1

mahazer. He had also stated that he had arrested the accused and prepared Ext.P2 arrest memo and gave Ext.P2 (a) arrest intimation to his wife as his house is situated near the place of occurrence. Thereafter he along with the contraband article and accused came to the excise office and entrusted to PW3, the Excise Inspector for further action. PW4 the excise guard corroborated the evidence of PW2 on this aspect. Though they were examined at length, nothing was brought out to discredit his evidence in this regard. There is no enmity brought out for giving false evidence against accused by Pws 2 and 4 as well. Further PW3 had identified MO1 as the article produced before him and he has also stated that accused was produced along with the contraband article and documents prepared and immediately registered case and produced the articles and the accused before court on the same day. So their evidence will go to show that the accused was arrested along with MO1 plastic bag containing 7 packets of arrack of which two packets were taken as sample.

It is true that there is no label affixed. It is no where

mentioned either in the Criminal Procedure Code or in the excise manual as to affixture of label on the sample. It was only done as a precautionary method and it is not mandatory. The contraband articles seized will have to be sealed so as to avoid tampering of the same on a later occasion. Merely because seal was not seen at the time when the evidence was taken is not sufficient to disbelieve the prosecution case as the evidence in this case was given after nearly four years of the seizure. So the possibility of seal being damaged or lost cannot be ruled out. Further plastic bag was opened at the request of the defence counsel in open court and it contained 7 plastic covers with liquid and two empty covers as described in Ext.P1 mahazer. Further when plastic cover was opened, it contained some seal which was removed at the instance of the defence counsel in open court. Nothing was put to PW2 about the seal seen on the cover which was removed from court at the instance of the defence counsel and so they cannot now say that there was no seal seen as rightly observed by the court below. That shows that articles which were described in

Ext.P1 had reached the court in a tamper proof condition when it was examined before court as well. Further, it will be seen from Ext.P4 property list that it was produced before the Magistrate along with the remand report and other documents on 17.10.1999 itself when the accused was produced before him. The initial of the Magistrate is seen on the property list and also in the occurrence report. So that shows that the report regarding seizure was produced before court forthwith without delay as explained in the decision reported in ***Ravi v. State of Kerala*** (2011(3) KHC 121). Further Ext.P4 shows that even the requisition for chemical examination was also produced along with the property list and thondi articles were also produced. So merely because it was received in court on 22.10.1999 alone is not sufficient to come to a conclusion that there was unexplained delay in producing the article before court especially when the articles along with the documents were produced before the Magistrate when the accused was produced and initial of the magistrate was seen in those documents. Further Ext.P5 chemical analysis report shows

that seal on the bottle was intact and found tallied with the sample seal provided. That also shows that the sample seal provided in the requisition letter was tallied with the seal seen in the bottle which also strengthen the case of the prosecution that it reached the chemical examiner's lab without any tampering. So from all these evidence, it can be safely concluded that the prosecution has proved beyond reasonable doubt that the accused was arrested by PW2 along with one litre of arrack carried in 7 packets of 150 ml each while he was transiting the same. Possession of which is an offence punishable under sections 8(1) and 8(2) of the Abkari Act and the court below was perfectly justified in convicting the appellant for the offences of possession of arrack which ought to have been under section 8(1) instead of section 55(a) of the Abkari Act as done by the court below and conviction does not call for any interference.

13. As regards the sentence is concerned, the court below had 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 six months more. The court below was perfectly justified in not invoking the provision of Probation of Offenders Act in this case. It is also seen from the judgment of the court below that he was accused in SC.No.291/2003 of the same court and he was convicted in that case. It is not known as to what happened to that case, whether any appeal has been preferred or not. However from the circumstances it cannot be said that he is not a first offender entitled to seek for any leniency from court in respect of sentence. Persons who are committing abkari offences committing the same knowing that what they are doing is wrong and ignoring the consequences of their act on innocent persons who are consuming such articles which was prohibited by the State. They are doing it only for their personal gain. In such cases if it is found that they were guilty of committing such offences, they must be dealt with severely. Showing unnecessary leniency in such cases will only give a wrong signal to the society. Considering these aspects, the sentence of one year rigorous imprisonment and fine of Rs. One lakh

with default sentence of simple imprisonment for six months imposed by the court below cannot be said to be excessive or harsh. I do not find any reason to interfere with the sentence imposed by the court below. So the appeal fails and the same is hereby dismissed.

In the result, the appeal is dismissed and the order of conviction and sentence passed by the court below against the appellant under section 55(a) of the Abkari Act (ought to be under section 8(1) of the Abkari Act) are hereby confirmed.

Office is directed to communicate a copy of this judgment to the concerned court immediately

SD/-

K. RAMAKRISHNAN, JUDGE.

/true copy/

P.S to Judge

cl

