

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

WEDNESDAY, THE 27TH DAY OF MAY 2015/6TH JYAISHTA, 1937

CRL.A.No. 1261 of 2005 ()

AGAINST THE JUDGMENT IN SC 127/2004 of ADDL.SESIONS COURT
(ADHOC)-II, THODUPUZHA DATED 23-07-2005
(CP 2/2004 of J.M.F.C., NEDUMKANDOM

APPELLANT(S)/ACCUSED:

RAJAN, S/O.PAPPU,
THOTTATHILKUDIYIL VEEDU, KUZHITHODU KARA
KARUNAPURAM VILLAGE.

BY ADVS.SRI.GRASHIOUS KURIAKOSE
SRI.GEORGE MATHEWS

RESPONDENT(S)/COMPLAINANT:

STATE - C.I. OF POLICE,
KAMBUMMETTU, REP. BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.

R1 BY ADV. SRI. GITESH. R - PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
27-05-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

acd

P.D. RAJAN, J.

Crl. Appeal.No.1261 of 2005

Dated this the 27th day of May, 2015

JUDGMENT

This appeal is preferred against the conviction and sentence in S.C.No.127/2004 of Additional Sessions Court (Adhoc-II), Thodupuzha for offence punishable u/s.8(2) of the Abkari Act (hereinafter referred to as the "Act").

2. The facts necessary for the indictment were that on 10.10.2003, at 7.30 p.m, while PW4, the Sub Inspector of Police, Kambammedu Police Station was conducting patrol duty within his jurisdiction, he got an information that the appellant was selling arrack in his house bearing No.XII/379 in Karunapuram panchayat. On the basis of that information, he proceeded to the place of occurrence, at that time,

accused was found standing in the courtyard of his house with a bottle. He inspected the bottle in which he detected 750 ml of arrack. The accused was arrested after preparing Ext.P2 mahazar, reaching at the police station PW4 registered a crime. After completing investigation, Police laid charge before Judicial First Class Magistrate Court, Nedumkandam from where the case was committed to Sessions Court, Thodupuzha. , which was made over to Addl. Sessions Court (Adhoc),-II, Thodupuzha. Prosecution examined PWs 1 to 4 and admitted documentary evidence Exts.P1 to P6 and marked material object MO1, in evidence to prove the allegation, Ext.D1 was marked as defence evidence. After hearing both sides, the learned Sessions Judge convicted the appellant u/s. 8(2) of the Abkari Act and sentenced thereunder.

3. The learned counsel for the appellant contended that there is unexplained delay of 4 days in producing the seized articles before Court. No search warrant was obtained by PW4 before proceeding to the place of search and he has not recorded the reasons and grounds of his belief before conducting search. There was no proper sampling and the investigating officer is silent about the custody of the seized article. The seized arrack was not sealed at the place of occurrence. When there is violation of the benevolent provisions of the Abkari Act, the appellant is entitled to get the benefit of doubt.

4. It is the fundamental principle of criminal jurisprudence that an accused is presumed to be innocent unless the prosecution proved the guilt of the accused beyond reasonable doubt. In this context, I have perused the nature of seizure in this case. The search and seizure

was conducted by PW4. On 10.10.03, while he was on patrol duty, he got information that appellant was conducting sale of arrack in his house. When he reached there, the appellant was found in the courtyard of his house with 750 ml of arrack. He seized the arrack after preparing Ext.P1 mahazar. The arrack bottle was sealed at the place of occurrence, reaching at the Police Station, he registered a crime. PW3 deposed that he was present at the time of seizure of arrack and identified MO1 bottle. The independent witnesses PW1 and PW2 admitted their signatures in Ext.P1 mahazar. But, they did not see the seizure of arrack from the appellant.

5. According to Section 31 of the Kerala Abkari Act, whenever an Abkari Officer not below the rank as specified by the Government in this behalf or any Police Officer not below the rank of Sub Inspector or a Police

Station Officer has reason to believe that an offence under the Act has been committed and there is any delay in obtaining a search warrant to prevent the execution thereof, he may after recording his reason and the grounds of his belief at any time by day or night, enter and search any place and may seize anything found therein which he has reason to believe to be liable to confiscation under this Act. He may also detain and search such person, if he thinks proper and arrest any person found in such place whom he has reason to believe to be guilty of any offence under this Act. This section shows that in urgent cases where it may not be possible for the officer concerned to get the warrant from the authority mentioned U/s.30 of the Act, he may after recording reasons and grounds for belief, search the place and seize the materials. But Section 34 of the Abkari Act says any

Abkari Officer may arrest without warrant in any public thorough fare or open place other than a dwelling house, any person found committing an offence punishable under this Act and may seize and detain such liquor or intoxicating drug or materials or implements. While conducting such arrest, he shall apply the provisions of the Code of Criminal Procedure. According to S.36 all searches under the Act shall be made according to the provisions of Code of Criminal Procedure.

6. In urgent situation, it is not possible to get warrant, then the officer, after recording the reason and ground of belief, at any time by day or night enter and search any place and seize the materials without a warrant. In compliance of the Act, he has to record the reasons and ground of his belief into writing before proceeding to search. In this case also after arrival at the place of

occurrence, he can make his own opinion about the information and proceed to the place of seizure, after recording the ground of his belief, since the seizure was made at 7.30 after sunset. Here, the seizure was from the courtyard of the appellant, which is a private place. If that be the position, the Abkari officer, after recording his reasons and the grounds of his belief, enter and search any place and may seize anything found therein which he has reason to believe to be liable to confiscation. In this case, the Sub Inspector failed to record the ground of belief before proceeding to search and it amounts to violation of S.31. This shows the non-compliance of the valuable safeguards provided for protecting the liberty of the citizen has been violated.

7. This Court in Dominic v. State of Kerala [1989(1) KLT 601] held as follows:

"11. Counsel then contended that there was violation of S.31 of the Abkari Act and that this vitiates prosecution. He referred to the decision in K.L. Subbayah v. State of Karnataka (AIRn1979 SC 711) to support his argument that failure to record reasons vitiates the search. S.31 was not complied with, in making the search. Violation of the provision is indeed a serious matter, and that calls for serious notice. But, irregularity in search and seizure, by themselves will not make the evidence in admissible. It has been so held in Pooranmal v. Director of Inspection (AIR 1974 SC 348), Pratap Singh v. Director of Enforcement (AIR 1985 SC 989) and State of Maharashtra v. Natwarlal (AIR 1980 SC 593). In Pooranmal's case, a constitution Bench of the Supreme Court held that evidence obtained as a result of illegal search of seizure, is not liable to be shut out.

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8. When there is non-compliance of S.31, it is a serious matter which vitiates the conviction. This position had been explained by the Apex Court in K.L. Subhayya v. State of Karnataka [AIR 1979 SC 711] while considering Section 54 of Mysore Excise Act (21 of 1966), which is parimateria with S.31 of the Abkari Act (1 of 1077) Kerala,

in which in paragraph 4 of the judgment held as follows:

"4. This, therefore renders the entire search without jurisdiction and as a logical corollary vitiates the conviction. We feel that both Ss.53 and 54 contain valuable safeguards for the liberty of the citizen in order to protect them from ill-founded or frivolous prosecution or harassment. The point was taken before the High Court which appears to have brushed aside this legal lacuna without making any real attempt to analyse the effect of the provisions of Sections 53 and 54. The High Court observed that these two sections were wholly irrelevant. With due respect, we are unable to approve of such a cryptic approach to a legal question which is of far-reaching consequences. It was, however, suggested that the word 'place' would not include the car, but the definition of the word 'place' under the Act clearly includes vehicle which would include a car. Thus the ground on which the argument of the petitioner has been rejected by the High Court cannot be sustained by us. We are satisfied that there has been a direct non-compliance of the provisions of S.54 which renders the search completely without jurisdiction. In this view of the mater, the appeal is allowed, the conviction and sentence passed on the appellant is set aside and he is acquitted of the charge framed against him."

9. The detecting officer has not taken any sample at the time of seizure, on the other hand, he sealed the

articles from the place of occurrence and produced at the Police Station, but in his report, there was no mention about the custody of the articles. The bottle containing 750ml arrack was seized and sealed at the place of occurrence, subsequently, it was submitted to the Magistrate for sending it to the chemical analysis. Ext.P6 is the chemical examination report, in which it is certified that, one sealed packet having a sealed bottle containing 750ml of colourless clear liquid alleged to be 'arrack' involved in case No.92/2003 of Kambammettu Police Station, received for chemical analysis. The seals on the packets were intact and found tallied with the sample seal provided. When there is no sampling, it is clear that as per Ext.P6, 750 ml was forwarded to chemical examiners' report, but no mention that, after examination, balance arrack with bottle was returned to the trial Court. The

sealed bottle was found 750ml, which was marked as MO1 in the trial Court. Now the question is which article was examined in the chemical examiners' lab.

10. This Court in Sasidharan v. State of Kerala [2007 (1) KLT 720] held that "the prosecution has a duty to prove that it was the sample taken from the contraband liquor seized from the accused, which had reached the hands of the Chemical Examiner in a fool proof condition." This Court in Ravi v. State of Kerala (2011(3) KLT 353) considered the statutory responsibility of sampling. It was held as follows:-

" There is the possibility that the properties would have been tampered with. The prosecution, in a case of this nature can succeed only if it is shown that the contraband liquor which was allegedly seized from the accused ultimately reached the hands of the Chemical Examiner by change of hands in a tamper-proof condition. (Vide State of Rajasthan V. Daulath Ram (AIR 1980 SC 1314) and Valsala V. State of Kerala (1993(2) KLT

550 (SC). No conviction can be entered against the accused in a prosecution as the present one unless it is proved that the sample which was analysed in the Chemical Examiner's laboratory was the very same sample drawn from the contraband liquor allegedly found in the possession of the accused (see Sathi V. State of Kerala (20076(1) KLT SN 57 (C.No.82) and Sasidharan V. State of Kerala (2007(1) KLT 720). There is no satisfactory link evidence to show that it was the same bottles seized from the appellant which eventually found their way into the hands of the Chemical Examiner and that there was no meddling or tampering with the bottles while they were in the custody of PW4. Hence, the result of Ext.P7 Chemical Analysis cannot be applied against the appellant".

As noticed earlier, series of improprieties were committed in the matter of sending the same for analysis. Therefore, the evidence adduced by chemical analyst cannot be conclusive and a finding of guilt is not possible on the basis of chemical analysis report.

11. Considering the legal infirmity found in this case, it is clear that the seizure of the arrack from the

possession of the appellant does not fasten any credibility for a conviction. Therefore, the conviction and sentence passed by the trial Court u/s.8(2) of the Abkari Act are set aside and accordingly, the appellant is acquitted.

Crl.Appeal is allowed.

P.D. RAJAN, JUDGE.

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