

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 12TH DAY OF OCTOBER 2015/20TH ASWINA, 1937

CRL.A.No. 1262 of 2005 ()

SC 124/2001 of ADDL.DISTRICT COURT (ADHOC), KASARAGOD

APPELLANT(S)/ACCUSED :

**JOSHI.M.J., AGED 27 YEARS,
S/O.JOSEPH, MAVELIKKUNNU, NECHIPPATUPPU
KARIVETAKAM.**

BY ADV. SRI.M.SANTHOSHKUMAR

RESPONDENT(S):

- 1. THE EXCISE INSPECTOR,
BADIADKA IN CRIME NO. 2/2000.**
- 2. STATE OF KERALA REPRESENTED BY
THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA
ERNAKULAM.**

R2 BY PUBLIC PROSECUTOR SMT. SEENA RAMAKRISHNAN

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 12-10-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

SKV

K.RAMAKRISHNAN, J.

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Crl. Appeal No.1262 OF 2005

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Dated this the 12th day of October, 2015

JUDGMENT

Accused in SC No.124/2001 on the file of the additional Sessions Court (Adhoc-1) Kasaragod is the appellant herein. The appellant was charge sheeted by the Excise Inspector in Crime No.2/2000 of Badiadaka Excise Range under Section 55(a) of the Abkari Act.

2. The case of the prosecution in nutshell was that on 14.1.2000 at about 6 pm, the accused was found to be in possession of 200 packets of Karnataka made arrack of 100 ml. each and found transitting the same for the purpose of sale in violation of the provisions of the Abkari Act and thereby he had committed the offence punishable under Section 55(a) and (i) of the Abkari Act (ought to be under Section 8(1) read with Section 8(2) of the Abkari Act).

3. After conviction, final report was filed before the Judicial First Class Magistrate Court, Kasaragod where it was

taken on file as CP No. 114/2000. After complying with the formalities, the learned Magistrate committed the case to Sessions Court, Kasaragod under 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 After committal, the case was taken on file by the Sessions court, Badiadka as SC 124/2001 and it was originally made over to Assistant Sessions Court, Kasaragod for disposal. Subsequently, it was withdrawn by the Sessions Judge and made over to Additional Sessions Court (Adhoc-1) Kasaragod for disposal.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) read with 8 (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 5 were examined and Exts.P1to 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 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, 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 9 months and to pay a fine of Rs.1,00,000/- and in default to undergo rigorous imprisonment for 3 months more. Set off was allowed for the period of detention already undergone by him under Section 428 of the Code. Aggrieved by the

same, the present appeal has been filed by the appellant/accused before the court below.

5. On the last hearing date it was represented through Advocate C.K. Sreejith, that Advocate Sri.N Santhosh Kumar who filed the appeal is not practicing now and steps will be taken to engage a new counsel. The case was posted today. Today there is no representation.

6. Heard the learned the Public Prosecutor Smt. Seena Ramakrishnan and peruse the records. According to the learned Public Prosecutor there is nothing to be interfered with the finding of court below and conviction entered is proper and maximum leniency has been shown in the case of sentence also.

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

On 14.1.2000, at about 6.00 pm, while PW1 the Assistant Excise Inspector, Badiadka Excise Range was doing

patrol duty along with preventive officer and when they reached the road near the house of one Devassia in Karivedakam village, they saw the accused coming through a rubber plantation towards the road with MO1 bag in his hands and on seeing the excise party, he tried to go away from that place. So they stopped him. PW1 took the bag from the accused and on verification, he found that it contained 200 packets of 180 ml. liquid and it was also seen that it was intended to be sold in Karnataka only. He had taken three packets and opened the same and examined the same by smelling and tasting and satisfied that it was arrack. Since all the packets were identical and similar, he had taken the liquid seen in three opened packets in a bottle as sample and sealed the same and affixed label containing the signatures of himself, witnesses and accused. He had put the remaining packets and three empty packets in MO1 bag itself and closed the same and sealed the same and labelled

the same also in the same fashion and seized the same as per Ext.P1 mahazar in the presence of PWs1 and 2. He had arrested the accused and gave intimation regarding the arrest to his relative and then came to excise office and produced the accused and the contraband articles seized along with the documents before PW5, the excise inspector who registered Ext.P2 crime and occurrence report as Crime No.2/2000 under Section 55(a) and (8) of the Abkari Act. He prepared Ext.P3 property list and produced the accused along with remand report before the court. He had produced the articles along with the property list and sent Ext.P4 forwarding list with a request to send the articles for analysis. He questioned the witnesses and recorded their statements. He completed investigation and submitted final report.

8. The prosecution relies on the evidence of PWs1 to 4 and Ext.P1 to prove the seizure. PWs 3 and 4 are the

independent witnesses to seizure, but they did not support the case of the prosecution. Though they admitted the signature in Ext.P1, they denied having seen the seizure and arrest of the accused. Then the evidence is only that of PWs1 and 2 Assistant Excise Inspector and PW2, the Preventive Officer who accompanied him. They have categorically stated that on 14.1.2000 at about 6.00 pm, while they were doing patrol duty and when they reached the place of occurrence, they saw the accused coming through rubber plantation towards the road with MO1 bag in his hand on seeing the excise party, he tried to go away from the place. So they stopped him. On verification by PW1, MO1 bag contained 200 packets of 100 ml liquid. He took three packets and on verification of the same, he was satisfied that it was arrack. Thereafter he had taken the liquid from the three opened bag in a bottle and sealed the same and labelled the same. He put the empty packets and remaining

packets in the MO1 packets itself and sealed the same and labelled the same and thereafter, he came to excise office after arresting the accused and produced the accused before PW5. The evidence of PW1 was corroborated by the evidence of PW2 the preventive officer as well. Though they were cross examined at length, nothing was brought out to discredit their evidence on this aspect. So the court below was perfectly justified in coming to the conclusion that the accused was arrested along with 200 packets of 100 ml. each said to be contained arrack.

9. It is seen from the documents produced that the articles were produced before the court on the very next day itself and forwarding note and other documents were also reached the court without delay. It was sent for chemical analysis and Ext.P5 report obtained which shows that it contained 32.84% by volume of ethyl alcohol. So the prosecution has proved that the articles seized was arrack.

10. But it will be seen from the evidence that PW1 was only an Assistant Excise Inspector who is not an Abkari Officer as defined under the Act empowered with the powers of arrest, seizure and contraband articles under the Abkari Act.

11. The power of the Assistant Excise Inspector prior to the notification SRO 361/2009 dated 8.5.2009 by which only Assistant Excise Inspectors were also empowered as Abkari Officers to exercise the powers of Abkari Officers under the Act, it has been considered by this court in *Sasidharan v State of Kerala* [2012 (2) KLT 392] and held that arrest, seizure made by the Assistant Excise Sub Inspector prior to 8.5.2009 is not legal as he is not an empowered officer relying on the decision reported in *Subramaniyan v State of Kerala* [2010 (2) KLT 470] and given that benefit to the accused and acquitted the accused. In this case also since the arrest and seizure was made by Assistant Excise

Inspector who is not an Abkari Officer empowered under the Act to effect seizure and arrest and seizure is not valid and no conviction can be based on such illegal seizure and he is entitled to get acquittal. This aspect has not been considered by the court below before coming to the conclusion that the accused had committed the offence punishable under Section 55(a) of the Abkari Act and consequential conviction entered by the court below for the said offence is against law in view of the dictum laid down in the above decision and the same is liable to be set aside. The appellant is entitled to get acquittal of the charge levelled against him giving the benefit of doubt. Since this court has found that the appellant is entitled to get acquittal, the sentence imposed is also not proper, 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 the Abkari Act are hereby set aside. The appellant is acquitted of the charge levelled against him giving him the benefit of the dictum relied on above. The bail bond executed by him stand cancelled. The lower court is directed to refund the fine amount, if any remitted by the appellant on making necessary application to him for the purpose.

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

Sd/–

K.RAMAKRISHNAN, JUDGE

SKV