

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 2ND DAY OF NOVEMBER 2015/11TH KARTHIKA, 1937

CRL.A.No. 1610 of 2004 ()

SC 1484/2002 of III ADDL.DISTRICT COURT KOLLAM

APPELLANT(S)/ACCUSED:

PURUSHOTHAMAN PILLAI
S/O. RAGHAVAN PILLAI, KUNNUVILA VEEDU
NELLETTIL CHERRY, POOTHAKULAM VILLAGE, PARAVOOR
KOLLAM DISTRICT.

BY ADV. SRI.B.MOHANLAL

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA
SUB INSPECTOR OF POLICE PARAVOOR POLICE STATION
KOLLAM DISTRICT, THROUGH THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.

R1 BY PUBLIC PROSECUTOR SRI. JIBU P. THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 02-11-
2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SKV

K.RAMAKRISHNAN, J.

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Crl. Appeal No. 1610 OF 2004

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Dated this the 2nd day of November, 2015

JUDGMENT

Accused in SC No.1484/2002 on the file of the 3rd Additional Sessions Court, Kollam is the appellant herein. The appellant was charge sheeted by the Sub Inspector of Police, Paravoor Police Station under Section 55(a) and (i) of the Abkari Act in Crime No.273/2000 of that Police Station.

2. The case of the prosecution in nutshell was that on 31.8.2000 at about 4.30 pm, the accused was found to be in possession of 2.300 litres of arrack in 23 plastic packets of 100ml each, and found engaged in sale of the same from the property of one Chellappan Pillai situated on the east of Parayil Madan Nada, Edayadi Cherri at Poothakulam Village in violation of the provisions of the Abkari Act and thereby he had committed offence punishable under Section 55(a) and (i) of the Abkari Act.

3. After investigation, final report was filed before

the Judicial First Class Magistrate Court, Paravoor, where it was taken on file as CP No.55/2001. After complying with the formalities, the learned Magistrate committed the case to Sessions Court Kollam under Section 209 of the Code of Criminal Procedure (hereinafter referred to as the Code). After committal, the case was taken on file as SC No.4884/2002 by the Sessions Judge and the same was made over to 3rd Additional Sessions Court, Kollam for disposal.

4. When the accused appeared before the Court below, after hearing both sides, charge under Section 55 (a) and (i) of Abkari Act (ought to be under Section 8(1) and (2) of the Abkari Act and Section 55(i) of Abkari Act) was framed and same was read over and explained to him and he pleaded not guilty. In order to prove the case of the prosecution, PWs1 to 5 were examined and Exts.P1 to P4 and MOs1 to 5 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. He was only witnessing some persons playing cards from the temple compound and when the police came, the persons ran away from the place, except the accused and one Mohanan and they were taken by the police in the noon. At 4 pm they again came and obtained the signature in some papers from his son and others and 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. The father of PW5 was examined as DW1 to prove the case of the accused in defence.

5. After considering the evidence on record, the court below found the appellant not guilty under Section 55(i) of the Abkari Act and acquitted him that charge under Section 235(I) of the Code. But he was found guilty under Section 55(a) of the Abkari Act and convicted him thereunder and sentenced him to undergo rigorous imprisonment for 3 years and also to pay a fine of

Rs.1,00,000/- and in default to undergo rigorous imprisonment for 6 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 preferred by the appellant/accused before the court below.

6. Heard Smt. Preetha P.S. counsel representing Sri. B. Mohanlal counsel for the appellant and Sri. Jibu P. Thomas, learned Public Prosecutor appearing for the State.

7. The counsel for the appellant submitted that the independent witnesses PWs1 and 5 did not support the case of the prosecution and PW2 though examined in part later given up by the prosecution. Except the official witnesses PWs3 and 4, there is no other evidence adduced on the side of the prosecution to prove the seizure and arrest of the accused. Further the court below had not properly appreciated the evidence of DW1 to prove false implication. Further there were delay of more than one month in producing the article which has not

been properly explained and so it cannot be said that prosecution has proved beyond reasonable doubt that the articles produced were the same articles which were said to have been seized from the possession of the accused. Further in Ext.P2 mahazar there is nothing mentioned about affixture of any label which has spoken to by PWs3 and 4 before the court. These aspects were not properly appreciated by the court below and the order of conviction passed is not proper and he is entitled to get acquittal.

8. On the other hand the learned Public Prosecutor submitted that the evidence of PW4 coupled with the evidence of PW3 will go to show that prosecution has proved the seizure of arrack from the possession of the accused. Further court below was perfectly justified in rejecting the evidence of DW1 to prove false implication as claimed by the accused. The delay has been explained and PW4 has stated that he produced the articles before the court on the same day, but it was returned and thereafter it was produced on 11.10.2001. So the delay

has been properly explained and there is nothing to disbelieve the evidence of PW4 on this aspect. According to him, the court below was perfectly justified in convicting the accused for the of offence alleged.

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

On 31.8.2000 at about 4.30 pm, PW4 the Sub Inspector of Police, Paravoor Police Station was doing patrol duty along with PWs2 and 3 and when they reached the property of one Chellappan Pillai, they found the accused with a plastic kit in his hand and on seeing the police party, he tried to go away from the place. So PW4 stopped him and on examination of MOI kit in his hand, he found that it contained 23 packets of 100 ml each liquid. He opened all the packet and poured the liquid in MO3 kannas. Thereafter he took two samples of liquid of 150 ml in each in two bottles. Thereafter he sealed the bottles and the kannas and also kept the empty covers in MOI plastic kit and sealed the same as well. When he conducted body search of the accused, he found MO5

series currency notes for an amount of Rs.470/- from his pocket and he seized all these articles as per Ext.P2 mahazar in the presence of PWs1 and 5. He arrested the accused and prepared Ext.P1 arrest memo. He came to Police Station and registered Ext.P3 First Information Report as Crime No.273/2000 of Paravoor Police Station against the accused under Section 55(a) and (i) of the Abkari Act. He produced the accused before court along with remand report. He produced the articles before the court along with property list. He sent forwarding note with a request to send the sample for analysis and one of the samples was sent from court and Ext.P4 chemical analysis report obtained which shows that the sample contained 29.22% by volume of ethyl alcohol. He himself had conducted investigation. He questioned the witnesses and recorded statement. He completed the investigation and submitted final report.

10. PWs1 and 5 are the independent witnesses to seizure. They have denied having seen the arrest or seizure. PW1 had even denied his signature in Ext.P2

mahazar. PW5 had admitted his signature in Exts.P2. He denied the signatures seen in labels on MO3 and MO4. He had further stated that he had not seen the police arresting the accused or seizing any article from him. According to him, he signed Ext.P2 at 4 pm from the road while he was coming after his work. But he had admitted that he knew the accused. So it is clear from their evidence that PWs1 and 5 are now helping the accused and that was the reason why they are not supporting the case of the prosecution.

11. Then there is evidence of only PWs3 and 4, police official who accompanied PW4 and the detecting officer PW4 himself. PW4 had deposed that while he was doing patrol duty that time along with Pws3 and 2 and when he reached near the property of one Chandran Pillai, he saw the accused standing there with MO1 plastic kit in his hand and on seeing the police party, he tried to run away from the place and so he stopped him and verified the contents of MO1 and it contained 23 plastic packets of 100 ml each liquid. He took the liquids seen in

the plastic packets in MO3 cannas having capacity of 3 litres and he examined the contents and satisfied that it was arrack and thereafter he took two samples including MO4 sample bottle. He sealed the bottles and cannas and put the empty covers in MOI kit and sealed the same as well. According, to him he affixed label containing the signatures of witnesses and himself and affixed the same on the sample bottles and cannas and MO1 kit. MO2 series are the empty plastic bag kept in MO1 kit, after collecting the liquid in MO3 cannas. Thereafter he arrested the accused and prepared Ext.P1 arrest memo and seized the articles as per Ext.P2 mahazar and came to Police Station and registered the crime. The evidence given by PW4 was corroborated by the evidence of PW3 the Police Constable who accompanied him. Though they were cross examined at length, nothing was brought out to discredit the evidence on this aspect. Further they denied the suggestion that they went to the temple compound on that day at noon and found some persons playing cards and on seeing the police party, they ran

away and they took the accused and one Mohanan and thereafter the present accused was falsely implicated in the case. Accused examined DW1, the father of PW5 to prove false implication. A reading of his evidence will go to show that he is now trying to help the accused and that was the reason why he came to court to give evidence in favour of the accused. The accused himself had no case that he was arrested in the noon as claimed by DW1. So under the circumstances, court below was perfectly justified in rejecting the evidence of DW1 examined on the side of the accused to prove false implication and perfectly justified in relying on the evidence of PWs3 and 4 and coming to the conclusion that the accused was arrested by PW4 along with some packets containing some liquid said to be arrack.

12. Merely because some article said to be arrack was seized from the possession of the accused alone is not sufficient to prove that he was found to be in possession of arrack. It must be further proved by the prosecution, that the articles said to have been seized

from the possession of the accused had reached the court in a tamper free condition and chemical analysis report relates to the representative sample said to have been taken from the contraband articles alleged to have been seized from the possession of the accused. In this case, it was admitted by PW4 that he produced articles seized before court on 11.10.2000. But according to him, he had produced the articles on the next day itself. But it was returned to him and thereafter he produced the same on 11.10.2000. But no such endorsement was seen made in the property list. Quite unfortunately the property list was not marked in this case. In Ext.P2 mahazar there is nothing mentioned about affixture of any label as spoken to by PWs 3 and 4 before the court. It is seen from the property list that the articles were produced before the court only on 11.10.2000. It was on that day except the sample other articles were returned to the police official for safe custody. There is no prior endorsement made as spoken to by PW4. So under the circumstances, it can only be presumed that articles were produced before the

court only on 11.10.2000 and not prior to that date as claimed by PW1 and now he is giving an explanation to that effect only to safe guard his interest and to explain the delay in producing the article which could only be an afterthought. So it cannot be said that the prosecution was able to prove that the articles reached the court in a tamper free condition especially when the articles produced before court contains some label affixing of which was not mentioned in Ext.P2 mahazar. So under the circumstances, it cannot be said that the properties reached the court in a tamper free condition and Ext.P4 report relates to the sample said to have been taken from the articles seized from the possession of the accused.

13. In the decision reported in **Ravi v State of Kerala and Another** [2011 (3) KHC 121], the Division Bench of this court had held that mere delay in producing the article before the court is not always fatal, if the delay has been explained to the satisfaction of the court. But if the delay is not explained, then that benefit must be given to the accused. In this case, the delay has not

been properly explained and there is label found in the cannases said to be containing the signatures of PWs1 and 5. But no such thing was mentioned in Ext.P2 mahazar, which is a contemporary document prepared by the detecting officer while effecting seizure of the contraband articles alleged to be from the possession of the accused. So it cannot be said that the prosecution has proved that the articles seized were the articles produced in court and the chemical analysis report relates to the representative sample taken from the contraband articles said to have been seized from the possession of the accused so as to connect him with the contraband article seized. These aspects were not considered by the court below before coming to a conclusion that prosecution has proved beyond reasonable doubt that the accused was found to be in possession of arrack and consequential conviction entered by the court below is also unsustainable in law and the same is liable to be set aside. The appellant is entitled to get acquittal of the charge levelled against him giving him the benefit of

doubt.

14. In view of my finding that the appellant is entitled to get acquittal, the sentence imposed is not proper and the same is also set aside.

In the result appellant succeeds and the appeal is allowed and the order of conviction and sentenced passed by the court below against the appellant under Section 55 (a) of the Abkari Act is 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 court below is directed to refund the fine amount, if any remitted by the appellant to him, on making necessary application before that court for that purpose.

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

K.RAMAKRISHNAN, JUDGE

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