

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 16TH DAY OF NOVEMBER 2015/25TH KARTHIKA, 1937

CRL.A.No. 1290 of 2005 ( )  
-----

AGAINST THE JUDGMENT IN SC 74/2005 of ADDL.DISTRICT COURT (ADHOC-I),  
KOTTAYAM DATED 04-07-2004

AGAINST THE ORDER IN CP 39/2004 of J.M.F.C.-I, KANJIRAPPALLY

APPELLANT/ACCUSED NO.1.:  
-----

RENCHAN NAIR, AGED 450, S/O.GOPINATHAN NAIR,  
PADIYARAPARAMBIL HOUSE, VIZHIKKATHODU BAHGOM,  
CHENAPPADI KARA, KOOVAPPALLY VILLAGE  
KOTTAYAM.

BY ADV. SRI.TITUS MANI

RESPONDENT/COMPLAINANT.:  
-----

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

BY PUBLIC PROSECUTOR SRI. JIBU P. THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 16-11-2015,  
ALONG WITH CRA. 1296/2005, THE COURT ON THE SAME DAY DELIVERED THE  
FOLLOWING:

**K. RAMAKRISHNAN, J.**

.....  
Crl.A.Nos.1290 & 1296 of 2005

.....  
Dated this the 16<sup>th</sup> day of November, 2015

**JUDGMENT**

Crl.A.No.1290/2005 was filed by the first accused while Crl.A.No.1296/2005 was filed by the second accused in SC.No.74/2005 on the file of the Additional Sessions Court, Adhoc-I, Kottayam. Both the appellants were charge sheeted by the Excise Inspector, Kanjirappally excise range in Crime No.22/2003 of that excise range under sections 55(a) and 13 of the Abkari Act.

2. The case of the prosecution in nutshell was that on 31.7.2003, at about 7.35 p.m, the accused were found illegally transporting 14 bottles of Indian made foreign liquor, in an autorickshaw with No.KL 5J 9329, driven by the second accused and held by the first accused without valid permit and licence at a place near a panchayat waiting shed on the left side of Kanjirapally-Manimala road and thereby all of them have committed the offence punishable under sections 55(a) and 13 of the Abkari Act.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court-I, Kanjirappally, where it

was taken on file as C.PNo.39/2004. After complying with the formalities, learned Magistrate committed the case to Sessions Court, Kottayam under section 209 of the Code of Criminal Procedure (hereinafter referred to as 'the Code') and after committal, the learned Sessions Judge took cognizance of the case as S.C.No.74/2005 and thereafter it was made over to the Additional Sessions Court, Adhoc-I, Kottayam for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under sections 55 (a) and 13 of the Abkari Act was framed and the same was read over and explained to them and they 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 series and MO2 were marked on the side of the prosecution. After closure of the prosecution evidence, the accused were questioned under section 313 of the Code and they denied all the incriminating circumstances brought against them in the prosecution evidence. They have further stated that they have not committed any offence and they are innocent of the same. Since evidence in this case did not warrant an acquittal under section 232 of the Code, the accused were called upon to enter on their defence and no

defence evidence was adduced on their side.

5. After considering the evidence on record, the court below found the appellants guilty under sections 55 (a) and 13 of the Abkari Act and convicted them thereunder and sentenced them to undergo rigorous imprisonment for one year each and also to pay a fine of Rs.One lakh each, in default to undergo rigorous imprisonment for three months each under section 55(a) of the Abkari Act. Set off was allowed for the period of detention already undergone under section 428 of the Code. Aggrieved by the same, the above appeals were filed by the appellants/respective accused before the court below.

6. Since both these appeals arose out of the same judgment, this Court is disposing of these appeals by a common judgment.

7. Heard Sri. Titus Mani, counsel appearing for the appellant in Crl.A.No.1290/2005 and Sri. V.B. Premachandran, counsel appearing for the appellant in Crl.A.No.1296/2005 and Sri. Jibu P.Thomas, learned Public Prosecutor appearing for the State in both these appeals.

8. Counsel for the appellant in Crl.A.No.1296/2005

submitted that appellant is only driver of the vehicle and it is not possible for him to verify all the articles carried by the passengers before permitting them to travel in the vehicle. So it cannot be said that it was with his connivance that the contraband articles were transported in the vehicle. No such evidence was adduced by the prosecution as well. Further, the specimen seal impression said to have been put on the bottles were not produced before court. So that shows that there is possibility of tampering before it was produced before court. According to him, the appellant is entitled to get acquittal.

9. On the other hand, counsel appearing for the appellant in Crl.A.No.1290/2005 argued that, according to PW1, he had produced the specimen seal impression of the seal used for sealing the articles before the Excise Inspector, who registered the crime. But, those seals were not produced before court. There is no explanation forthcoming from the side of the prosecution as to why the specimen seal impression was not produced before court. Further, the forwarding note also does not contain the specimen seal impression. He had relied on the decision reported in **Krishnan v. State** (2015 (1) KHC 822) in support of his case and argued for acquittal. He had further

submitted that even as per the evidence, all the contraband articles seized is licit liquor, which were purchased from the outlet of the Kerala State Beverages Corporation and at the most, if at all this Court convicted the accused, it would fall under section 63 of the Act and not under section 55(a) of the Abkari Act.

10. On the other hand, learned Public Prosecutor submitted that there is no delay in producing the article and this aspect has been considered by the court below in detail in the judgment as well. So under the circumstances, the court below was perfectly justified in convicting the appellants for the offence alleged.

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

On 31.7.2003, at about 7.30 p.m, PW1 was doing patrol duty along with his party and while he was conducting vehicle checkup at the place of occurrence, he saw an auto rickshaw with No.KL5J 9329 came from Ponkunnam side and he stopped the vehicle and found that it was driven by the second accused and first accused was holding MO2 big shopper bag between his legs. On examination of the bag, he found that it

contained 14 bottles of Indian made foreign liquor of 375 ml each of different brand and when he questioned the first accused, he told that he purchased the same from nearby Kerala State Beverages Corporation outlet and they did not give bill for the same. Since they were not having any bill with them, he was satisfied that it was intended for sale and he opened three samples from each brand and examined the same and satisfied that it was Indian made foreign liquor and he took sample from all the bottles and sealed the same and affixed label containing signature of himself and the witnesses. Thereafter he seized sample bottles, MO1 series and MO2 big shopper bag as per Ext.P1 mahazer in the presence of Pws 1 and 2. Thereafter he came to the excise office and entrusted the same to PW4, who registered Ext.P3 crime and occurrence report as Crime No.22/2003 of Kanjirappally excise range against the appellants under sections 55(a) and 13 of the Abkari Act. He produced the accused before court along with the remand report. He prepared the property list and produced articles before court on the next day itself. He sent the forwarding note with request to send sample for analysis and samples were sent from court and Ext.P4 chemical analysis

report obtained. He questioned the witnesses and recorded their statements. He produced Ext.P2 photocopy of the R.C. Book seized by PW3 from the second accused before court. He completed the investigation and submitted final report.

12. Pws 1 and 2 are the independent witnesses to the seizure. Though they admitted the signature in Ext.P1 mahazer, they denied having seen the arrest and seizure of the contraband articles from the possession of the accused persons. They have further stated that they knew the accused and they did not see the accused from the place of occurrence and they signed the documents from the excise office as requested by the excise officials. So it is clear from the evidence that they are now trying to help the accused and that was the reason why they are not supporting the case of the prosecution.

13. Then the evidence available is that of PW3, the detecting officer and PW4, the investigating officer. PW3 had categorically stated that he was working as Circle Inspector excise range of that excise range and while he was doing patrol duty along with his party and doing vehicle check up, he found the auto rickshaw mentioned coming through that road

and stopped the same and on verification, he found that the vehicle was driven by the second accused and the first accused was holding MO2 big shopper bag between his legs. On verification of the bag, he found that it contained 14 bottles of 375 ml each foreign liquor. He had taken sample from each bottle and sealed the same and seized all the bottles including the sample along with MO2 big shopper and seized the auto rickshaw as well and then produced the auto rickshaw before the Assistant Excise Commissioner for further action. He produced the accused along with the contraband articles and the documents prepared before PW4. Though he was cross examined at length, nothing was brought out to discredit his evidence regarding this aspect. So the court below was perfectly justified in coming to the conclusion that the accused persons were arrested by PW3, while the second accused was driving the vehicle and first accused was carrying MO1 bag which said to have contained Indian made foreign liquor.

14. It is settled law that mere arrest of persons with liquor alone is not sufficient to prove that they have committed the offence. The prosecution has to further prove that the articles reached court in the same condition in which it was seized and

it reached the chemical analysis laboratory also in the same condition. In this case, unfortunately neither the property list nor the forwarding note were marked through the prosecution witnesses. However, the certified copy of the forwarding note obtained from court was put to the witnesses when they were in the box. PW3 had categorically stated that he had used his personal seal for sealing the article and he had produced the specimen seal impression before the excise inspector, who registered the crime. But unfortunately, the specimen seal impression said to have been given by PW3 to the Excise Inspector was not produced before court nor it was marked through witnesses as well. Further PW3 had not mentioned about the nature of seal used by him for sealing the article in Ext.P1 mahazer. So in the absence of such a specific mention about the seal used in the mahazer, non production of the specimen seal impression by the investigating officer become relevant, that creates doubt regarding the fact that the articles were produced before court in a tamper free condition as claimed by the prosecution. Further, in the forwarding note in the space provided for specimen seal impression it was kept blank and PW4 had stated that it would have been omitted to

be affixed there. This was taken by the court below as an omission on the part of the investigating officer and that cannot be taken as a ground for acquittal. But, in the decision reported in **Krishnan's case (cited supra)** it has been observed by this Court that for ensuring that sample of contraband allegedly seized by the Excise Inspector from accused had reached Chemical examiner for analysis, it has to be proved that seal affixed on sample is provided to the chemical examiner for comparison. In the absence of which, there is no assurance that chemical examiner examined the sample taken from bulk allegedly seized from the accused and that benefit must be given to the accused. That was also the case where the articles seized were produced in court without delay of specimen seal impression of the seal for sealing the article was not produced and there was no specimen seal impression provided in the forwarding note also. It was under such circumstances that this Court has granted the benefit to the accused and acquitted the accused on that ground.

15. In this case also there is no explanation forthcoming from the side of the prosecution for not producing the specimen seal impression said to have handed over by the detecting

officer namely PW3. Further a reading of the evidence of PW4 will go to show that he had not conducted proper investigation of the case as well. He was not aware of the date on which he had questioned the witnesses and he had not gone to the place of occurrence as well and he had not prepared any scene mahazer and according to him, since place of occurrence is the vehicle, he had not prepared the scene mahazer appears to be not convincing. So under the circumstances, it is seen that investigation was also not properly conducted in this case. The accused is also entitled to get that benefit.

16. Further as far as the second accused is concerned, he was only a driver of the vehicle. There is no evidence adduced on the side of the prosecution to prove the relationship between the first and second accused so as to infer that with his connivance that the contraband articles were transported in the vehicle. As rightly pointed out by the counsel for the appellant in Crl.A.No.1296/2005, it is not possible for the driver to verify and check of the package that is being carried by the passenger in the vehicle before he was permitted to travel in the vehicle. Merely because he was driving in the vehicle at the relevant time when the first accused said to be held

contraband article alone is not sufficient to come to the conclusion that it was with his connivance or with his knowledge that the articles were transported in the vehicle unless relation between the accused persons is established by the prosecution independently. That was not done in this case. So under the circumstances, the court below was not justified in convicting the second accused merely because he happened to be the driver of the vehicle for the offence alleged and he is entitled to get acquittal of the charge levelled against him giving him the benefit of doubt.

17. Since this Court has found that the prosecution has failed to prove that the contraband articles have reached the court in tamper proof condition and there was no proper investigation on these aspects, the accused are entitled to get acquittal of the charge levelled against him. The finding of the court below that the prosecution has proved beyond reasonable doubt that the first accused has also committed the offence is also unsustainable in law and the conviction entered by the court below in view of the discussions made above is unsustainable in law and the same is liable to be set aside and the appellants are entitled to get acquittal of the charge levelled

against them giving them the benefit of doubt. Since this court has found that the appellants are entitled to get acquittal, the sentence imposed is not proper and the same is liable to be set aside.

In the result both the appellants succeed and the appeals are allowed. The order of conviction and sentence passed by the court below against the appellants for the offence under sections 55(a) and 13 of the Abkari Act are hereby set aside and they are acquitted of the charge levelled against them giving them the benefit of doubt. They are set at liberty. The bail bonds executed by them will stand cancelled. The court below is directed to refund the fine amount, if any, remitted by the appellants to them on making necessary application in that regard.

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

Sd/-

**K. RAMAKRISHNAN, JUDGE.**

cl

/true copy/

P.S to Judge