

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

FRIDAY, THE 20TH DAY OF NOVEMBER 2015/29TH KARTHIKA, 1937

CRL.A.No. 1695 of 2004 ()

AGAINST THE JUDGMENT IN SC 1938/2001 of ADDITIONAL DISTRICT COURT
(ADHOC), TRIVANDRUM DATED 25,9,2004

APPELLANT/ACCUSED: :

VASANTHA, D/O.VALLIYAMMA,
KARIMADAM COLONY, KURIATHY WARD,
MANACAUD VILLAGE
TRIVANDRUM.

BY ADV. SRI.V.R.GOPU
ADV.SRI. J. NARAYANA PILLAI

RESPONDENT/COMPLAINANT: :

STATE OF KERALA, REP. BY THE EXCISE
INSPECTOR, TRIVANDRUM, THROUGH THE PUBLIC
PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY P.P.SRI. JIBU P. THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 20-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. RAMAKRISHNAN, J.

.....
Crl.A.No.1695 of 2004
.....

Dated this the 20th day of November, 2015

JUDGMENT

The accused in SC.No.1938/2001 on the file of the Additional Sessions Court, Fast Track-I, Thiruvananthapuram is the appellant herein. The appellant was charge sheeted by the Excise Inspector, Thiruvananthapuram excise range in Crime No.8/1998 of that excise range under sections 55(a) and 8(1) of the Abkari Act.

2. The case of the prosecution in nutshell was that on 30.1.1998, at about 4.30 p.m, the accused was found to be in possession of 2.25 litres of coloured arrack and found transiting the same on the northern side of Killippalam - Karipettikada road, on the east of Kalyani Hospital, Manacaud village, in violation of the provisions of the Abkri Act and thereby she had committed the offence punishable under section 8(1) of the Abkari Act.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court-II, Thiruvananthapuram where it was taken on file as C.P.No.224/2000. After complying with the formalities, the learned Magistrate committed the case

to the Sessions Court, Thiruvananthapuram 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 as S.C.No.1938/2001 and thereafter originally it was made over to the Assistant Sessions Court, Thiruvananthapuram. Subsequently it was withdrawn by the Sessions Judge and made over to the Additional Sessions Court, Fast Track-I, Thiruvananthapuram for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under section 55(a) and 8(1) of the Abkari Act was framed and the same was read over and explained to her and she pleaded not guilty. In order to prove the case of the prosecution, Pws 1 to 4 were examined and Exts.P1 to P5 and Mos 1 and II were marked on their side. After closure of the prosecution evidence, the accused was questioned under section 313 of the Code and she denied all the incriminating circumstances brought against her in the prosecution evidence. She had further stated that she has been falsely implicated in the case. Since evidence in this case did not warrant an acquittal under section 232 of the Code, the accused was called upon to enter on her defence. But no

defence evidence was adduced on her side. After considering the evidence on record, the court below found the appellant guilty under section 55(a) read with section 8(1) of the Abkari Act and convicted her thereunder and sentenced to undergo simple imprisonment for one year and also to pay a fine of Rs. One lakh, in default, to undergo simple imprisonment for six months more. Set off was allowed for the period of detention already undergone under section 428 of the Code. Aggrieved by the same, the above appeal has been preferred by the appellant/accused before the court below.

5. Heard Sri. J. Narayana Pillai, counsel representing V.R. Gopu, counsel for the appellant and Sri. Jibu P. Thomas, Public Prosecutor appearing for the State.

6. Counsel for the appellant submitted that the independent witnesses to the seizure turned hostile. Property list and the forwarding note were not marked. Nature of seal used for sealing the article was not produced. Further there was no spot sample taken and there is no evidence to show as to who had taken the sample and how it was sent etc as well. So under the circumstances, it cannot be said that the prosecution has proved beyond reasonable doubt that the chemical analysis report

relates to the representative sample said to have been taken from the contraband article alleged to have been seized from the possession of the accused. These aspects were not considered by the court below before convicting the appellant for the offence alleged. So, the accused is entitled to get acquittal.

7. On the other hand, learned Public Prosecutor submitted that there was no delay in producing the article and PW1 had stated that sample was taken from court and it was sent from court. There is nothing to disbelieve his evidence on this aspect. He had further submitted that no interference is called for as court below had considered this aspect in the right perspective and convicted the accused for the offence alleged.

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

On 31.1.1998, at about 4.30 p.m, PW1 along with PW2 and others were doing patrol duty and when they reached Kilippalam - Karipettikada road, on the east of Kalyani Hospital in Manacaud, they saw the accused coming with MOII bag in her hand and on seeing the excise party, she tried to go away from the place. So PW1 stopped her and examined MOII bag

and found that it contained 3 bottles containing liquid of 750 ml each. He had tasted the contents of the bottles and satisfied that it was arrack. So he sealed the bottles, affixed label containing signature of himself, accused and the witnesses and affixed label in the same manner in MOII bag and seized MO1 series bottle found along with MOII bag as per Ext.P1 mahazer in the presence of PW3 and another. He arrested the accused and prepared Ext.P2 arrest memo and gave Ext.P3 arrest intimation to relative of the accused. Thereafter he came to the excise office along with the accused and contraband articles and registered Ext.P4 crime and occurrence report. He had produced the article before court along with the property list and produced the accused along with the remand report on the same day. On the basis of the requisition given by him, sample was taken from court and it was sent from court and Ext.P5 chemical analysis report obtained. PW4, the Excise Inspector had conducted the investigation. He questioned the witnesses and recorded their statements. He collected Ext.P5 chemical analysis report, completed investigation and submitted final report.

9. PW3 is an independent witness to the seizure. But he

did not support the case of the prosecution. He had even denied his signature in Ext.P1. So his evidence is not helpful either to prove the arrest or seizure of the contraband article.

10. Then the evidence available is that of Pws 1 and 2, the detecting officer and the accompanying officer to the seizure and arrest. PW1 had categorically stated that, on that day, while they were doing patrol duty and when they reached the place of detection, they saw the accused coming with MOII plastic bag and on seeing the excise party, she tried to go away from the place. So they stopped her and he verified the contents of MOII bag and found MO1 series three bottles of 750 ml capacity containing full of some liquid. He tasted the contents of the bottles and satisfied that it was arrack. Thereafter he sealed the same, affixed label and seized MO1 series and MOII bag after affixing label as per Ext.P1 mahazer. Thereafter he came to the excise office and registered crime and produced the article with property list and the accused along with remand report before court. According to him, on the basis of the requisition given by him, sample was taken from court and it was sent through excise guard Upendra Nathan. The evidence of PW1 was corroborated by the evidence of PW2, the

accompanying officer. Though they were cross examined at length, nothing was brought out to discredit their evidence regarding arrest of the accused and seizure of Mo1 series bottles with MoII bag. So the court below was perfectly justified in coming to the conclusion that the prosecution has proved that the accused was arrested along with MO1 series bottles with MOII bag.

11. Mere seizure of the article alone is not sufficient to convict the accused, but it must be proved by the prosecution that the chemical analysis report relates to the representative sample taken from the article seized from the possession of the accused. Though Pws 1 and 2 had stated that personal seal of PW1 was affixed on the bottles, specimen seal impression of the seal was not produced before court. Further property list was not marked. On verification of the property list available in the case bundle, it was not mentioned in the property list that the bottles were sealed and labelled, Further though there is endorsement by the property clerk to grant sanction to take sample and entrust remaining Mos to the excise Inspector and that sample was taken and a direction was given to the thondi clerk to return the article to the Excise Officer,

Thiruvananthapuram for safe custody, the person who had taken the sample namely property clerk was not examined. Further it is not seen from the property list that any sanction has been granted as requested for but what is written is sample taken.

12. In the decision reported in **Sasidharan v. State of Kerala** (2007 (1) KLT 720) it has been observed that:

"Prosecution has a duty to prove that it was the sample taken from the contraband liquor seized from the possession of the accused which had reached the hands of the Chemical Examiner in a fool proof condition. Without the link evidence of actual sampling by the concerned clerk of the court by drawing sample from the can and sending the same in a sealed packet to the Chemical Examiner with a specimen seal sent separately for tamper proof despatch, the Prosecution cannot be held to have brought home the offence against the appellant. The prosecution had 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".

In the same decision it has been observed that"

"Committing Magistrate have to take care that contemporary proceedings evidencing the drawing of sample and sending the same to the Chemical Examiner in a tamper-proof condition are recorded in the proceedings before court. Sessions Judges trying such cases also should ensure that the

concerned member of the staff, who had drawn the sample and despatched the same to the Chemical Examiner duly packed and sealed under the covering letter of the Magistrate is examined before court during trial. The Public Prosecutor in charge of the case also had a duty to file an additional witness-list for examining the thondy section clerk (property clerk) concerned so as to establish the nexus between the contraband substance and the accused"

13. In this case, the property clerk who had drawn the sample was not examined to prove the procedure followed by him for taking the sample. The court below had relied on the endorsement made in the property list which was not even marked for the purpose of coming to the conclusion that the sample was taken from court. PW1 was not present at the time when the sample was taken and this was admitted by him as well. Though the evidence of Pw 1 will go to show that there was seal affixed and the seal was removed from court when sample was taken, the property list does not show the presence of any seal or even it was not mentioned whether it was sealed bottle. So under the circumstances, the dictum laid down in the above decision is applicable to the facts of this case and it

cannot be said that the prosecution has proved the link between the accused and the contraband article and chemical analysis report relates to the representative sample said to have been taken from the contraband article alleged to have been seized from the possession of the accused and in the absence of link evidence, it cannot be said that the prosecution has succeeded in bring home guilt of the accused in the commission of the offence. So the observation made by the court below that the prosecution has proved the case against the accused beyond reasonable doubt and the consequential conviction entered by the court below is unsustainable in law and the same is liable to be set aside. The appellant is entitled to get acquittal of the charge levelled against her giving her the benefit of doubt. Since this Court has found that the appellant is entitled to get acquittal, sentence imposed is also not proper and the same also liable to be set aside.

In the result, the appellant succeeds and the appeal is allowed. Order of conviction and sentence passed by the court below against the appellant under section 55(a) read with section 8(1) of the Abkari Act are hereby set aside. The appellant is acquitted of the charge levelled against her giving

her the benefit of doubt. The bail bond executed by the appellant stands cancelled. The court below is directed to refund the fine amount, if any, remitted by the appellant to her on making necessary application for that purpose.

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

Sd/-

K. RAMAKRISHNAN, JUDGE.

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/true copy/

P.S to Judge

