

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

FRIDAY, THE 13TH DAY OF NOVEMBER 2015/22ND KARTHIKA, 1937

CRL.A.No. 1702 of 2004 (C)

**AGAINST THE JUDGMENT IN SC 593/2002 of ADDITIONAL SESSIONS COURT-II,
ALAPPUZHA DATED 04-09-2004**

IN CP 140/2001 of JUDICIAL FIRST CLAS MAGISTRATE COURT, MAVELIKKARA

APPELLANT/ACCUSED:

**CHELLAPPAN, S/O KESAVAN
BINDU BHAVANAM, PELA MURI, KANNAMANGALAM.**

BY ADV. SRI.BIMAL K.NATH

RESPONDENT/COMPLAINANT.:

**EXCISE INSPECTOR,
MAVELIKKARA RANGE, REPRESENTED BY PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.**

BY ADV. JIBU P. THOMAS, PUBLIC PROSECUTOR

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 13-11-2015, THE COURT
ON THE SAME DAY DELIVERED THE FOLLOWING:**

K. RAMAKRISHNAN, J.

Crl. Appeal No.1702 of 2004

Dated this the 13th day of November, 2015

JUDGMENT

Accused in S.C.No.593/2002 on the file of the Additional Sessions Court, Fast Track-II, Alappuzha is the appellant herein. The appellant was charge-sheeted by the Excise Inspector, Mavelikkara in Crime No.63/1999 of Mavelikkara Excise Range under Section 55(a) of Abkari Act (ought to be under Section 8 (1) of Abakri Act).

2. The case of prosecution in nutshell was that on 21.10.1999, at about 5.40 pm, accused was found to be in possession of 1 1/2 litres of arrack in three bottles in a house with name Bindhu Bhavan with No.C.P.121/VI of Kannamthanam Village in violation of the provisions of Abkari Act and thereby he had committed the aforesaid offence.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court, Mavelikkara where it was taken on file as C.P.No.140/2001. After complying with the formalities, the learned Magistrate committed the case to

Sessions Court, Alappuzha under Section 209 of the Criminal Procedure Code. After committal, Sessions Judge took cognizance of the case as S.C.No.593/2002 and made over to Additional Sessions Court, Ad-hoc-II, Alappuzha 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 have been under Section 8(1) and (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 6 were examined and Exts.P1 to P5 and MOs. 1 to 3 were marked on their side. After closure of the prosecution evidence, the accused was questioned under 313 of the Code of Criminal Procedure. 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 no article was seized from his possession. He has been taken from road on the way to his house after his work. Since the evidence in this case did not warrant an acquittal under Section 232 of the Code of Criminal Procedure, the accused was called upon to enter on his evidence. 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 Abkari Act and convicted him thereunder and sentenced him to undergo rigorous imprisonment for one year and also to pay a fine of Rupees One lakh in default to undergo rigorous imprisonment for three months. Set off was allowed for the period of detention already undergone under Section 428 of the Code of Criminal Procedure. Aggrieved by the same, the present appeal has been preferred by the appellant accused before the court below.

5. Heard Sri Bimal K.Nath, Advocate appearing for the appellant and Sri Jibu P. Thomas, learned Public Prosecutor appearing for the State.

6. Learned counsel for the appellant submitted that no search memo was produced in court. Further, the witnesses to the seizure turned hostile and so, the seizure has not been properly proved. Further, there is no evidence to show that the accused is the owner of the house and he was in control and domain over the house so as to prove that he was in conscious possession of the article so as to convict him for the said offence. It was admitted by the investigating officer that house stands in the name of the wife and there are other family members

residing in the house. So under the circumstances, court below was not justified in convicting the appellant for the offence alleged and he is entitled to get acquittal.

7. On the other hand, the learned Public Prosecutor submitted that he was arrested from the spot and the evidence will go to show that he is also residing in the house and so court below was perfectly justified in convicting the appellant for the offence alleged.

8. The case of the prosecution as emerged from the prosecution witnesses was as follows: On 21.10.1999, at about 5.30 pm, while PW-1, the preventing officer attached to Mavelikkara Excise Range was doing patrol duty alongwith PW-2 and others, they got reliable information that the accused was selling arrack from his house at Kannamangalam and immediately he sent a search memo through excise guard and thereafter proceeded to the house of the accused and found the accused sitting in the veranda of the house. Thereafter, they conducted search of the house in the presence of PWs. 4 and 5 and found three bottles of 750 ml capacity containing liquid of 500 ml each kept on the south western corner of the middle room of the house. On examination of the contents of the bottle,

he was satisfied that it was illegally manufactured arrack. So he arrested the accused and took sample of 200 ml each from 2 bottles and sealed the same and affixed label containing signature of himself and accused and the witnesses. He sealed and labelled MOs. 1 to 3 bottles with remaining liquid in the same fashion and prepared Ext.P2 search list and gave a copy of the same to the accused. Thereafter, he seized the articles as per Ext.P1 mahazar. Thereafter, he came to excise office and produced the accused before PW-6, preventive officer in charge of Excise Inspector of the range alongwith the contraband articles seized. PW-6 who was in charge of the office at that time registered Ext.P4 crime and occurrence report as Crime No.63/99 of Mavelikkara Excise Range against the accused under Section 55(a) of the Abkari Act. He prepared Ext.P5 property list and produced the accused alongwith remand report and the contraband articles seized alongwith the property list before court on the same day. On the basis of his request, samples were sent for analysis from court and Ext.P3 chemical analysis report obtained which shows that sample contained 36.66% and 26.47% by volume of ethyl alcohol respectively. The investigation in this case was conducted by PW-3, who

questioned the witnesses and recorded their statements. He collected Ext.P3 chemical analysis report, completed the investigation and submitted final report.

9. PWs. 4 and 5 were the independent witnesses in seizure. Though they admitted their signature in Exts.P1 and P2 search list and seizure mahazar, they denied having seen the seizure and arrest of the accused. But they have admitted that the accused was present in the house alongwith the excise officials at the time when they signed the documents. So it is clear from their evidence that they were trying to help the accused and that was the reason why they were not supporting the case of the prosecution fully.

10. PWs. 1 and 2 were the detecting officer and the officer who accompanied the detecting officer. PW.1 had categorically stated that on that day, while they were doing patrol duty, they got information that accused was selling arrack from his house. Immediately he prepared a search memo and sent the same to court through an excise guard and thereafter, went to the house and found the accused sitting in the Veranda of the house. They conducted search of the house and found MOs. 1 to 3 bottles with 500 ml liquid in each bottle on the south

western corner of the middle room of the house. He examined the contents of the same and satisfied that it was arrack. He took samples from two bottles and sealed and labelled the sample bottles, MOs. 1 to 3 and prepared Ext.P2 search list and seized the same as per Ext.P1 seizure mahazar. Thereafter, he came to office and produced the accused and the articles through an excise guard before the Excise range officer from where PW-6 had registered the crime and completed the formalities of producing the accused and contraband articles before court. PW-2 had corroborated the evidence of PW-1 on this aspect. Though they were cross-examined at length, nothing was brought out to discredit the evidence on this aspect. So the fact that accused was arrested from the house and MOs. 1 to 3 bottles were seized from the south western corner of the house was proved by the evidence of PWs. 1 and 2 and to some extent, the evidence of hostile witnesses PWs.4 and 5 as well. So under the circumstances, court below was perfectly justified in coming to the conclusion that search and seizure were proper and accused was arrested from that house.

11. The articles were produced before court without delay. The chemical analysis report shows that it contains ethyl

alcohol and PWs.1 and 2 have stated that it was arrack. This fact was not challenged by the defence as well. So it can be safely concluded that prosecution proved that the article seized was arrack.

12. Merely because accused was present in house at the time of seizure alone is not sufficient to come to the conclusion that he was in conscious possession of the articles unless it is proved by the prosecution the link between the accused and the place from where the articles were seized. Admittedly in this case no document has been produced to prove that the accused was either the owner of the house or in possession of the house on the basis of any document. It was brought out in the evidence of PW-3 that the house belongs to the wife of the accused and there were other members residing in the house as well. Further there is no evidence to show that the accused was arrested at the time when he was handling the contraband articles and if that be the case, even if the ownership of the house is not proved or connection of the house with the accused is not proved, it can be presumed that he was in conscious possession of articles seized. In this case, the articles were found on the south western corner of the middle room. This is

no evidence to show that he is in complete control and domain over the house. So under the circumstances, it cannot be said that it was the accused who had placed the articles in the house and he was in conscious possession of the contraband articles so as to convict the appellant for the offences under Section 55(a) of Abkari Act. So the finding of the court below that since he was found in the house at the time of seizure and he is also residing in the house it can be presumed that it was he who had possessed the contraband articles and kept the same in the house is unsustainable in law in view of the fact that he is not the owner of the house and there are other persons also residing in the house alongwith the accused and under such circumstances, it cannot be said that he was in conscious possession of the articles so as to convict him for the offence alleged. So the finding of the court below that the 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 against the appellant for the said offence are 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. 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, 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. 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 for that purpose.

Office is directed to communicate this judgment to the court below at the earliest.

SD/-
K. RAMAKRISHNAN,
JUDGE

JV