

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. 1703 of 2004 (C)

AGAINST THE JUDGMENT IN SC 353/2002 of ADDL.SESIONS COURT, FAST TRACK-II, THIRUVANANTHAPURAM DATED 30-09-2004

AGAINST THE ORDER IN CP 202/2000 of J.M.F.C.-I, THIRUVANANTHAPURAM

APPELLANT/ACCUSED.:

RAVEENDRAN, AGED 28 YEARS, T.C.39/157,
KARIMADOM COLONY, CHALAI WARD, MANACAUD VILLAGE
THIRUVANANTHAPURAM.

BY ADVS.SRI.SASTHAMANGALAM S. AJITHKUMAR
SRI.KRISHNADAS P. NAIR
SMT.K.L.SREEKALA
SRI.HARIDAS P.NAIR
SRI.PRABHU VIJAYAKUMAR

RESPONDENT/COMPLAINANT.:

STATE OF KERALA
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR JIBU P. THOMAS

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

K. RAMAKRISHNAN, J.

.....
Crl.A.No.1703 of 2004
.....

Dated this the 2nd day of November, 2015

JUDGMENT

The accused in S.C.No.353/2002 on the file of the Additional Sessions Judge, Fast Track-II, Thiruvananthapuram is the appellant herein.

2. The appellant was charge sheeted by the Excise Inspector, Thiruvananthapuram excise range in Crime No.38/1998 of that excise range under section 55(a) of the Abkari Act (ought to be under sections 8(1) and (2) of the Abkari Act).

3. The case of the prosecution in nutshell was that on, 16.10.1998, at about 10 a.m, the accused was found to be in possession of 5 litres of arrack and found transiting the same along Killipalam-Kruppattikkada road in front of Kalyani hospital in violation of the provisions of the Abkari Act and thereby he had committed the offence punishable under section 55(a) of the Abkari Act.

4. After investigation, final report was filed before the Judicial First Class Magistrate Court, Thiruvannathpruam, where it was taken on file as C.P.No.202/2000. After complying

with the formalities, learned Magistrate committed the case to 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 as S.C.No.353/2002 and it was made over to the Additional Sessions Court, Adhoc-II, Thiruvananthapuram for disposal.

5. When the accused appeared before the court below, after hearing both sides, charge under section 55(a) 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 4 were examined and Exts.P1 to P4 and MO 1 were marked on their side. After closure of the prosecution evidence, 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 been taken into custody on 14.5.1998 at about 4 p.m from his house by the excise inspector and two excise guards and kept him in custody for two days and thereafter he was produced before court along with the arrack kept in the excise office since he was against abkari lobby in the area. Since evidence in

this case did not warrant an acquittal under section 232 of the Code, he was called upon to enter on his defence but no defence evidence was adduced on his side. After considering the evidence on record, the 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 one and half years and also to pay a fine of Rs. One lakh, in default to undergo simple imprisonment for three months. Set off was allowed for the period of detention already undergone 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 Sri.Sasthamangalam S. Ajithkumar, counsel appearing for the appellant and Sri. Jibu P. Thomas, counsel appearing for the State.

7. Counsel for the appellant submitted that there is discrepancy in the evidence of excise officials and the independent witnesses regarding the nature of article said to have been seized. According to the independent witnesses, a plastic bottle was seized whereas, according to Pws 1 and 2, article seized was a cannas with arrack. Further, there was no

spot sample taken and there is no evidence to show that chemical analysis report relates to the 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 and he is entitled to get acquittal.

8. On the other hand, Public Prosecutor submitted that there is no delay in producing the sample and it reached the court on the same day itself and court below has considered these aspects and rightly convicted the accused for the offence alleged.

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

On 16.10.1998, at about 10 a.m, while PW1, the Excise Inspector, along with PW2 Preventive Officer, were doing patrol duty along Killipalam-Kruppattikkada road and when they reached in front of Kalyani hospital, they saw the accused coming with MO1 kannas and on seeing the excise party, he tried to go away from the place. So they stopped him and on examination of MO1 kannas, it was revealed that it contained 5 litres of some liquid, which on further examination, he was

convinced that it was arrack. So he arrested the accused, sealed the cannas and affixed label containing signature of himself and witnesses and seized the same as per Ext.P1 mahazer. He arrested the accused as per Ext.P2 arrest memo. He came to the excise office and registered Ext.P3 crime and occurrence report as Crime No.38/1998 of Thiruvananthapuram excise range under section 58 of the Abkari Act. He produced the accused along with the remand report and the contraband articles before court along with Ext.P4 property list on the same day. The sample was sent from court and Ext.P5 chemical analysis report obtained. Investigation in this case was conducted by PW4. He questioned the witnesses and recorded their statements. He collected chemical analysis report and produced the same before court. He completed the investigation and submitted final report.

10. Pws 1 and 2 are the excise officials, who detected the crime, and the person who accompanied the detecting officer respectively. PW3, is an independent witness to the seizure. PW1 had deposed that while he was doing patrol duty along with PW2, he saw the accused coming with MO1 cannas in his hand along the road in front of Kalyani hospital and on

seeing the excise party, he tried to go away from the place. So he stopped him and on examining the contents of the kannas, he satisfied that it contained 5 litres of some liquid. On further examination by smelling and tasting, he was convinced that it was arrack. He sealed the same and affixed label with signatures of himself and witnesses and seized the same as per Ext.P1 mahazer in the presence of PW3 and another. Thereafter he arrested the accused, came to the excise office, registered the crime and he produced the accused and the contraband articles before court along with property list and the remand report. PW2 had corroborated the evidence of PW1 on this aspect. PW3, is an independent witness to the seizure. He admitted the arrest of the accused in front of Kalyani hospital and he had admitted the signature in Ext.P1 mahazer as well. But, according to him, what was seized is only a bottle and not kannas. On a reading of his evidence will go to show that he is trying to help the accused and that was the reason why he was giving inconsistent version regarding nature of the article seized. There is nothing to disbelieve the evidence of PWs1 and 2 regarding the arrest of the accused along with the kannas, the content said to be arrack.

11. It is seen from the evidence that no spot sample was taken and, according to PW4, the investigating officer, there was no practice of taking sample from spot at that time. But there is no evidence adduced on the side of the prosecution as to from where the sample was taken, who had taken the sample, when it was sent from court for chemical examination etc. The chemical analysis report shows that one bottle containing 150 ml arrack has been sent for analysis. It is not known from where it was taken. None of the witnesses had spoken about the same as well.

12. It is true that the articles were produced before court on the same day itself, but according to PW1 and the description in the seizure mahazer that there was label affixed. But it will be seen from Ext.P4 property list that it was sealed but no label was affixed as well. Further, the thondi clerk, who had taken the sample, or the person who sent sample for analysis was not examined in this case. This aspect was considered by this Court in the decision reported in **Sasidharan v. State of Kerala** (2007 (1) KLT 720) and 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. Further, the same view has been reiterated in the subsequent decision of this Court reported in **Nalinakshan v. State of Kerala** (2012 (4) KHC 464). So, in the absence of any evidence adduced on the side of the prosecution that contraband article had reached chemical analysis laboratory in a tamper proof condition and 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, it cannot be said that the prosecution has succeeded in bringing home guilt of the accused beyond reasonable doubt so as to convict him for the offence alleged. These aspects were not properly considered by the court below before coming to the conclusion that prosecution has proved beyond reasonable doubt that the accused has committed the offence punishable under section 55(a) of the Abkari Act and conviction entered by the court below on this aspect 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 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. 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 stands cancelled. The court below is directed to refund the fine amount, if any, remitted by the appellant to him on making necessary application in that regard.

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

Sd/-

K. RAMAKRISHNAN, JUDGE

/true copy/

P.S to Judge

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K. RAMAKRISHNAN, JUDGE

