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. 1708 of 2004 (C)

SC 566/2002 ADDL.DISTRICT COURT (ADHOC)-II, ALAPPUZHA

APPELLANT:

CHELLAPPAN, AGED 47 YEARS
S/O.RAGHAVAN, PUTHENKANDATHIL, EAVOOR THEKKUM MURI
PATHIYOOR VILLAGE.

BY ADV. SRI.S.SHANAVAS KHAN

RESPONDENT(S)/COMPLAINANT:

THE STATE OF KERALA
REPRESENTED BY 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.1708 OF 2004

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Dated this the 2nd day of November, 2015

JUDGMENT

The accused in SC No.566/2002 on the file of the Additional Sessions Court (Adhoc-II), Alappuzha is the appellant herein. The appellant was charge sheeted by the Excise inspector of Kayamkulam Excise Range in Crime No.15/2001 of Kayamkulam Excise Range under Section 55(a) of the Abkari Act.

2. The case of the prosecution in nutshell was that on 25.6.2001, at about 6.30 pm, the accused was found to be in possession of 2 litres of arrack in a 10 litres capacity of cannas and found transitting the same through Moodayil mukku, Purathedath Kadavu road 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 (ought to be under Section 8(1) read with Section (2) of the Abkari Act).

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

was taken on file as CP No.72/2002. After complying with the formalities, the learned Magistrate committed the case to the Sessions Court, Alappuzha under Section 209 of the Code of Criminal Procedure (hereinafter referred to as the Code) and after committal, the case was taken on file as SC No.566/2002 on the file of the Sessions Court, Alappuzha and thereafter the case was made over to Additional Sessions Court (Adhoc-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 be under Section 8(1) 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 MO1 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 he had not committed any offence and he is a patient undergoing treatment. In order to prove the same, his wife was examined as DW1 and Ext.D1 was marked on his side. He was also examined to prove that no articles was seized from the possession of her husband and there was some dispute between Sankunni and Thulaseedharan, Excise officer in respect of the property and he has been falsely implicated in the incident. He had further stated that no article was seized from his possession and he has been falsely implicated in the case, as there was some dispute regarding the property of himself and one Sankunni and one Excise officer Thulaseedharan wanted to settle the case. Since he was not amenable for the same at the instance of Thulaseedharan he has been 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. His wife was examined as DW1 and Ext.D1 was marked through her to prove his defence of false implications.

5. After considering the evidence on record, the court below found that the false implicatios claimed by the accused is not established and 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 years and also to pay a fine of Rs.1,00,000/- and in default to undergo rigorous imprisonment for 3 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. Indu, counsel representing Shri.S. Shanavas Khan 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 court below had not properly appreciated the evidence adduced on the side of the defence that he has been falsely implicated in the case. DW1 had explained the

circumstances under which she happened to sign the arrest memo and Ext.D1 discharge card produced before the court that the accused is a patient and there is no possibility for him to commit any offence as claimed. He had also submitted that there was a delay in submitting the final report which has caused prejudice. The investigating officer in this case was not examined as well. So according to the learned counsel, the accused is entitled to get acquittal. The learned counsel also submitted that, if for any reason, this court found that the conviction cannot be interfered with she prayed for leniency in the sentence.

8. On the other hand, learned Public Prosecutor submitted that the court below was perfectly justified in rejecting the evidence of PW1 as she did not file any complaint for false implication. Se had admitted the signature in arrest memo. So there is no other evidence adduced through the alleged involvement of Excise Inspector in the property dispute between the Sankunni Nair and accused. Further the evidence will go to show

that the prosecution has proved the case beyond reasonable doubt and there was no delay in producing the article. As such the court below was perfectly justified in convicting the appellant for the offence alleged and sentence imposed is also proper.

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

On 25.6.2001, at about 6.30 pm, while PW1 was doing patrol duty along with PWs3 and 4 along with PW2 an Excise official and when they reached the place of occurrence, they saw the accused coming with MO1 cannas in his hand and on seeing the Excise party, he tried to go away from the place. So they stopped him and on examination of the cannas they found it contained 2 litres of some liquid. PW1 examined the contents by smelling and tasting and he was satisfied that it was arrack and thereafter, he took the sample from the liquid and sealed the same and sealed the cannas and seized the same as per Ext.P1 mahazar in the presence of PWs3 and 4. He arrested the accused and came to Excise office along with the accused and the contraband article and prepared Ext.P2 occurrence report as Crime No.15/2001 of Kayamkulam Excise Range against the accused under Section 55(a) of the Abkari Act. He produced the accused along with contraband articles with remand report and property list on the next day itself. He submitted forwarding note with a request to send the sample for analysis and the sample was sent from court to chemical examiners' laboratory and Ext.P4 chemical analysis report obtained, which shows that the sample contained 38.06% by volume of ethyl alcohol. The investigation in this case was conducted by CW5. He questioned the witnesses and recorded the statement. He collected the chemical analysis report and produced the same before the court. He completed the investigation and submitted final report.

10. PWs3 and 4 are the alleged witnesses to the seizure. Though they admitted their signature in Ext.P1 seizure mahazar, they denied having seen the seizure and arrest of the accused. They admitted that they knew the

accused. So it is clear from this that they are now trying to help the accused and that was the reason why they are not supporting the case of the prosecution. Then the evidence is that of PWs 1 and 2 , the detecting officer and the official who accompanied the detecting officer. PW1 had categorically stated that he was doing patrol duty along with PW2 and others on that day and when he reached the place of occurrence, he saw the accused coming with MO1 cannas in his hand and on seeing the Excise party, he tried to go away from that place. So they stopped him and examined the contents of the cannas and satisfied that it was arrack. Thereafter he took sample from the liquid and sealed the cannas and also the bottle and affixed labels on them containing the signatures of himself and witnesses and the accused and seized the same as per Ext.P1 mahazar. PW2 also corroborated the evidence of PW1 on these aspects. Though they were cross examined at length nothing was was brought out discredit their evidence on this aspect. They denied the suggestion that no article was seized from the possession of the accused and he was taken to Excise office as directed by Thulaseedharan an Excise official and he has been falsely implicated in the case.

11. In order to prove the case of the false implication, he wife of the accused was examined as DW1. According to her on one week prior to the incident, there was some dispute regarding the property between her husband and one Sankunni Nair and on a Sunday, Thulaseedharan Excise official intervened in the matter and wanted to settle the issue. But her husband was not amenable for the suggestion given by the Thulaseedharan, Excise Official. So as requested by Thulaseedharan her husband was called to the Excise office and thereafter he was falsely implicated in the case. She came to know about the same and she went there for taking bail for the accused, from there she was made to sign the arrest memo. But she had admitted the evidence that she did not file any complaint against false implication of her husband before any authorities. So that will go to show that the claim claim for false

implication is only an afterthought that is being deposed by PW1 in order to help her husband. So the court below was perfectly justified in rejecting the evidence of DW1 on the question of false implication as claimed by the accused.

12. It is settled law that merely because the witnesses to the seizure did not support the case of the prosecution regarding seizure alone is not sufficient to disbelieve the case of seizure. Court can rely on the official witnesses for this purpose, if it is satisfied with its trustworthiness and reliability. Though PWs1 and 2 were cross examined at length, nothing was brought out to discredit the evidence regarding the arrest of the accused along with the contraband article said to be arrack. So the court below was perfectly justified in coming to the conclusion that prosecution has proved beyond reasonable doubt and the accused was arrested along with MO1 cannas by PW1 said to be contained arrack.

13. It is seen from the evidence of PW1 and Ext.P3 property list that the articles were produced before the

court on the next day of seizure itself. Further there is nothing brought out to disbelieve the case of PW1 that articles were produced before court in a tamper free condition. Further the sample was sent from court on the basis of requisition given and Ext.P4 report obtained. The fact that the articles seized was arrack was not disputed. Their case was that arrack was seized from some property in abandoned condition was used and present case was falsely foisted against the accused.

14. So under the circumstance, the court below was perfectly justified in coming to the conclusion that the accused was found to be in possession of arrack and rightly convicted him for the offence of possession of arrack which is an offence under Section 8(1) of Abkari Act after the amendment and so the conviction is converted to one under Section 8(1) read with 8(2) of the Abkari Act instead of Section 55(a) of Abkari Act as found by the court below.

15. It is true that there is some delay in completing the investigation. CW5 the investigating officer was not

examined as he was no more. It is seen from the chemical analysis report that chemical analysis report was obtained was dated 7.12.2001 and it reached the court only on 10.4.2002. The final report was also filed in the year 2002. So it cannot be said that there was inordinate delay in conducting the investigation and filing the final report in this case. Further the articles seized and documents prepared were produced before the court with out delay. Mere delay in filing final report alone is not sufficient to acquit the accused unless any prejudice has been established by the accused on account of the same. In this case no such prejudice has been established as well. So under the circumstances, court below was perfectly justified in rejecting the contention of the accused. But he is entitled to get acquittal on the ground of delay in filing the final report, especially when the articles were produced before court without delay and the witnesses have admitted their signature in Ext.P1 and no other witnesses except the excise officials and seizure witnesses were cited as witnesses as well. So under the circumstances court below was perfectly justified in convicting the appellant for the offence of possession of arrack which ought to be under Section 8(1) and not under Section 55(a) and that conviction does not call for interference.

16. As regards the sentence is concerned, the court below has sentenced him to undergo rigours imprisonment for one year and also to pay a fine of Rs.1,00,000/- and in default to undergo rigorous imprisonment for 3 months.

17. It is true that persons who are committing offences under Abakri Act committing the same knowing that what is committed by the offence, ignoring the consequence of their act of innocent person who are consuming the illicit arrack that is being sold by them. However, at the same time, court can taken note of the antecedent of the accused, his family background and possibility of reformation etc. as a mitigating circumstance to show leniency in imposing sentence. It is seen from evidence of DW1 and Ext.D1 that he is

undergoing treatment for some illness and he was aged 47 at the time when the offence was committed. Now he would be around 60 years. Prosecution has no case that he has involved in any other crime in the similar nature as well. Considering these facts and also considering the quantity involved, this court feels that imposing a substantive sentence of 6 months and reducing the default sentence to one month by retaining the fine will be sufficient and that will meet ends of justice. So the substantive sentence of one year rigorous imprisonment and default sentence of 3 months rigorous imprisonment are set aside and the same is modified as follows:

The appellant is sentenced to undergo rigours imprisonment for 6 months and also to pay a fine of Rs.1,00,000/- and in default to undergo rigorous imprisonment for one month more. Set off is allowed for the period of detention already undergone.

In the result the appeal is allowed in part and the order of conviction passed by the court below against the appellant under Section 55(a) of the Abkari Act is converted to one under Section 8(1) of the Abkari Act and are hereby confirmed. The sentence of fine imposed is also confirmed. But the substantive sentence and default sentence imposed are set aside and same is modified as follows:

The appellant is sentenced to undergo rigours imprisonment for 6 months and also to pay a fine of Rs.1,00,000/- and in default to undergo rigorous imprisonment for one month more. Set off is allowed for the period of detention already undergone.

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

Sd/-
K.RAMAKRISHNAN, JUDGE

SKV