

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

FRIDAY, THE 11TH DAY OF DECEMBER 2015/20TH AGRAHAYANA, 1937

CRL.A.No. 1741 of 2004 (A)

**AGAINST THE JUDGMENT IN SC 284/2000 of ADDL. SESSIONS COURT (ADHOC),
THALASSERY DATED 08-10-2004**

APPELLANT(S)/ACCUSED::

**THACKANKOT SUKUMARAN, S/O CHELAPPAN
AGED 45 YEARS, DRIVER, MADAYIL AMSOM
KOZHI BAZAR, PAYANGADI, KANNUR DISTRICT.**

BY ADV. SRI.P.MURALEEDHARAN

RESPONDENT(S):

**STATE OF KERALA
REP. BY ITSPUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.**

BY PUBLIC PROSECUTOR SRI JIBU P THOMAS

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 11-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

LSN

K.RAMAKRISHNAN, J.

Crl.Appeal. No. 1741 of 2004

Dated this the 11th day of December, 2015

JUDGMENT

The accused in S.C 284/2000 on the file of the Additional Sessions Court (Adhoc-I), Tellicherry is the appellant herein. The appellant was charge sheeted by the Sub Inspector of Police, Payangadi Police Station in Crime No.60/2000 under Section 58 of the Abkari Act (Ought to be under Section 8(1) of the Abkari Act).

2. The case of the prosecution in nut shell was that on 09.04.2000, at about 9.10 a.m, the accused was found to be in possession of 10 litres of illicit arrack by the side of Sulthanthode palam situated at Madayi amsom near Kozhi Bazar in violation of the provisions of the Abkari Act and thereby he had committed the offence punishable under Section 58(ought to be under Section 8 (1)) of the Abkari Act.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court, Payyannur, where it was taken on file as CP No. 60/2000. After complying the formalities, the learned Magistrate

committed the case to Sessions Court, Tellicherry. After committal, the learned Sessions Judge took cognizance of the case as S.C 284/2000 and thereafter it was made over to the Additional Sessions Court (Adhoc-I), Tellicherry for disposal. When the accused appeared before the court below, after hearing both sides, charge under Section 58 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 P5 and MO 1 and II were marked on their side. After closure of the prosecution evidence, accused was questioned under Section 313 of the Code of Criminal Procedure (for short 'the Code') and he denied all the incriminating circumstances brought against him in the prosecution evidence. He had further stated that no article was seized from his possession. On 08.04.2000, he was taken from his house by the Sub Inspector of Police, Payangadi Police Station and thereafter he has been falsely implicated in the case. Since the evidence in this case did not warrant the

acquittal under Section 232 of the Code, the accused was called upon to enter on his defence. His brother-in-law and his wife were examined as DWs 1 and 2 respectively. After considering the evidence on record, the court below found the appellant guilty as Section 58 of the Abkari Act (which ought to be under Section 8(1) of the Abkari Act) and convicted him thereunder and sentenced to undergo Rigorous Imprisonment for one year and also to pay a fine of Rs.1,00,000/- in default to undergo Rigorous Imprisonment for three months more. Set off as allowed for a 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.

4. Heard Sri P Muraleedharan, learned counsel appearing for the appellant and Sri Jibu P Thomas, Public Prosecutor appearing for the State.

5. Counsel for the appellant submitted that the independent witnesses to the seizure did not support the case of the prosecution. They turned hostile. Though they

admitted the signature in the mahazar, but they have stated that they have signed the same from Police Station when they came for enquiry about some cases relating to them. So the court below was not justified in relying on the official witnesses alone to convict the accused. Further the chemical analysis report was not proved by examining the chemical examiner which should not have been relied on by the court below. Further the thondi clerk was not examined to prove that the sample was properly drawn and sent from court so as to prove the link between the accused and the contraband article seized. These aspects were not properly considered by the court below. So the conviction is not proper . He had relied on the decision reported in **Sasidharan v. State of Kerala (2007(1) KLT 720)** in support of his case. The evidence of DW1 and DW2 was also not properly appreciated by the court below.

6. On the other hand, the learned Public Prosecutor submitted that it was brought out in evidence of Pws 2 and 3 that we are now trying to help the accused

as they knew him. Further though DWs 1 and 2 were examined, they did not file any complaint against wrongful taking of the accused as claimed by them. So court below was perfectly justified and rejecting their case and convicting the accused.

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

On 9.04.2000 while PW1, the Sub Inspector of Police, Payangadi Police Station was doing patrol duty and reached near Kozhi Bazar at 9.10 a.m, he saw the accused coming through Sulthanthode Palam with MO II big shopper bag and on seeing the Police party, he tried to go away from the place. So he stopped him. On verification of the big shopper bag, it contained MOI cannass having a capacity of 10 litres with full of liquid and on further examination, he was satisfied that it was arrack. So he arrested the accused, took sample from the liquid, sealed and labelled the same with the signatures of himself, witnesses and the accused. He sealed and labelled the cannass also in the same fashion and seized

all these articles as per Ext.P1 mahazar in presence of PWs 2 and 3. Thereafter he came to the Police Station and registered Ext.P2 First Information Report as Crime No.60/2000 of Payangadi Police Station against the accused under Section 58 of the Abkari Act. Investigation in this case was conducted by PW4. He questioned the witnesses and recorded their statements. He went to the place of occurrence and prepared Ext.P4 scene mahazar. PW1 sent Ext.P3 forwarding note to court with request to send the sample for analysis which was sent from court and Ext.P5 chemical analysis report obtained. PW4 collected chemical analysis report, completed the investigation and prepared charge sheet, and entrusted the file to PW1 who submitted the final report.

8. PWs 2 and 3 are independent witnesses seizure. Though they admitted the signature in Ext.P1, they denied having seen the seizure or the arrest of the accused. Both of them had admitted that they knew the accused. PW2 had even gone for the extent of stating

that he signed the mahazar knowing that he signed the mahazar prepared for seizure of arrack. But he denied having seen the seizure or arrest of the accused. So it is clear from their evidence and conduct that they were trying to help the accused and that was the reason why they were not supporting the case of the prosecution.

9. Then the evidence available is that of PW1, the Detecting Officer. He had categorically stated that on 9.4.2000 at about 9.10.a.m while he was doing patrol duty along with Police Officials and when he reached near Sulthanthode Palam near Kozhi Bazar, he saw the accused coming with MO II big shopper bag and on seeing the Police party, he tried to go away from place. So he stopped him. On verification of the bag, he found MO I cannass in the bag. It is having capacity of 10 litres with full of liquid. He examined the contents of the cannass and satisfied that it was arrack. So he arrested the accused and took sample sealed and labelled the sample bottle and sealed and labelled the cannass and seized the same as per Ext.P1 mahazar and came to

Police Station and registered the crime. Though he was cross-examined, nothing was brought out to discredit his evidence regarding the seizure and arrest of the accused. The suggestion given to him that on 8.4.2000, he conducted raid of the house of one Kumaran and found that his son Anand was in possession of arrack and he ran away from that place, but he could not catch him and later since the accused did not co-operate to find out that person, he has been taken from the house and falsely implicated the case was denied by him.

10. In order to prove the case of the defence, the brother-in-law of the accused and his wife were examined as DWs 1 and 2 respectively. Both of them have stated that the accused was engaged in driving the autorickshaw of DW1 and on 08.4.2000, PW1 along with some Police Officers came there and took accused from there and thereafter he has been falsely implicated in the case. But both of them admitted that they did not enquire about the reason as to why the accused being taken from the house. They did not make any complaint

to higher authorities against wrongfully taking the accused to Police Station and falsely implicated him in a case. Further the accused also had no case when he was produced before the Magistrate, he had complained that he has been falsely implicated in the case and he was illegally detained from 08.04.2000 before he was produced before the court . So under the circumstances, court below was perfectly justified in rejecting the evidence of DWs 1 and 2 and accepting the evidence of PW1 and coming to the conclusion that the prosecution has proved the arrest of the accused and seizure of MO II big shopper bag with MO I cannass and to be containing arrack.

11. It is seen from the evidence of PW1 that articles were produced before the court on the next day. The accused was also produced before court on next day. He send the forwarding note with the request to send the article. It is marked as Ext.P3 and that was send from court and Ext.P5 chemical analysis report obtained which shows that the sample contained 29.44 per cent of

volume of ethyl alcohol. It is also mentioned in the chemical analysis report that the seal on the bottle was intact and found tallied with sample seal provided. The accused had no case that the article seized was not arrack and his case was that it was seized from the property of one Kumaran, which was handled by his son Anand and using the same he has been falsely implicated in the case. So under the circumstances it can be safely concluded that the prosecution has proved beyond reasonable doubt that the accused was found to be in possession of arrack.

12. The dictum laid down in the decision reported in **Sasidharan v. State of Kerala, 2007(1) KLT 720** is not applicable to the facts of this case. That was a case where no spot sample was taken from the contraband article seized. There was no evidence as to from where the sample was taken, though the prosecution has got a case that it was taken from court and it was sent from court. In such circumstances, this Court has held that without examining the thondi clerk of the concerned

court who had drawn the sample and packed and sent the same to chemical analysis lab with covering letter of the Magistrate, it cannot be said that the link between the accused and the contraband article seized were established so as to connect the accused with the contraband article. That was not a case here. The sample was taken from the spot and it was produced before the court without delay and it was sent from court at the request of the Detecting Officer and the report was obtained. Non-examination of the chemical examiner is not fatal as the report of the chemical examiner can be admitted in evidence in view of Section 293 of the Code. So non-examination of clerk or the chemical examiner in this case is not fatal and that is not required as well. So under the circumstances, the submission made by the counsel for the appellant has no substance and on that ground, he is not entitled to acquittal.

13. In view of the discussions made above, the finding of the court below that the prosecution has proved beyond reasonable doubt that the accused was

found to be in possession of 10 litres of arrack, possession of which is made punishable after 03.06.1997 by virtue of the Amendment Act under Section 8(1) of the Abkari Act and he is liable to be punished for the same under that Section. But court below had wrongly quoted the provision as under Section 58 of the Abkari Act and so the conviction entered by the court below against the appellant for possession of arrack is perfectly justifiable and it does not call for any interference

14. The counsel for the appellant submitted that the sentence imposed is harsh. The court below sentenced the accused to undergo Rigorous Imprisonment for one year and also to pay fine of Rs.1,00,000/- in default to undergo Rigorous Imprisonment for three months more. Persons who are committing offence under the Abkari Act are doing the same knowing that what they were doing is an offence and ignoring the consequence of their act on innocent person who are consuming such illegally manufactured arrack. Showing undue leniency in such cases will only

give a wrong signal to the Society and it may even cause loss of faith for the public in the criminal justice delivery system. The quantity of arrack seized is 10 litres. The court below considered all the aspects and showed maximum leniency and provided only one year Rigorous Imprisonment and fine of Rs.1,00,000/- with default sentence of three months Rigorous Imprisonment though punishment provided for such offence may extend to ten years. So under the circumstances the sentence imposed also cannot said to be harsh warranting interference of this court as it appears to be just and proper and maximum leniency has shown by the court below in imposing the sentence as well.

So the appeal fails and the same is hereby dismissed. The order of conviction and sentence passed by the court below against the appellant for possession of arrack though should have been convicted under Section 8(1) convicted under Section 58 of the Abkari Act are hereby confirmed.

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

**Sd/-K.RAMAKRISHNAN,
Judge**

True Copy

P.A to Judge

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