

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

TUESDAY, THE 3RD DAY OF NOVEMBER 2015/12TH KARTHIKA, 1937

CRL.A.No. 1747 of 2004 (A)  
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AGAINST THE JUDGMENT IN SC 38/2003 of ADDL.SESIONS COURT (ADHOC)-II,  
KOZHIKODE, DATED 09-09-2003.

APPELLANT(S)/ACCUSED:  
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JAYAN @ JAWAHAR, s/o. KESAVAN,  
PERUPPANAM KURI HOUSE, THIRUVANGOOR AMSOM,  
VENGALAM DESOM, KOZHIKODE DISTRICT.

BY ADV. SRI.SANTHARAM.P

RESPONDENT(S)/COMPLAINANT:  
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STATE OF KERALA, REPRESENTED BY  
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. JIBU P. THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 03-11-2015,  
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SS

**K. RAMAKRISHNAN, J.**

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Crl. Appeal No.1747 of 2004  
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Dated this the 3<sup>rd</sup> day of November, 2015

**JUDGMENT**

Accused in S.C.No.38/2003 on the file of the Additional Sessions Court (Ad-Hoc-II), Kozhikode, is the appellant herein. The appellant was charge-sheeted by the Excise Inspector, Quilandy Excise Range in Crime No.11/2000 of that range under Section 55(a) of Abkari Act (ought to be under Section 8(1) and (2) of the Abkari Act).

2. The case of the prosecution in nut shell was that, on 06.07.2000 at about 12.30 p.m., the accused was found carrying 2.5 liters of illicit arrack in a 2.5 liter plastic can through the by lane on the western side of the house of Peruppamvayal Balan, 50 meter east of railway line near to Thiruvangoor Trackson Industrials (hollowbricks) in Thiruvangoor, in violation of the provisions of Abkari Act and thereby he had committed the offence punishable under Section 55(a) of the Kerala Abkari Act.

3. After investigation, final report was filed

before the Judicial First Class Magistrate Court, Quilandy, where it was taken on file as C.P.No.52/2002; thereafter it was committed to the Sessions Court, Kozhikode by the learned magistrate under Section 209 of the Code of Criminal Procedure. After committal, the Sessions Court, Kozhikode had taken cognizance of the case as S.C.No.38/2003 and it was originally made over to the Assistant Sessions Court, Quilandy, for disposal; thereafter it was withdrawn and made over to Additional Sessions Court (Ad-Hoc-II), Kozhikode for disposal by the Sessions Judge.

4. 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 5 were examined and Exts.P1 to P8 and MO1 were marked on their side. After closure of the prosecution evidence, the accused was questioned under Section 313 of the Code of Criminal

Procedure and he denied all the incriminating circumstances brought against him in the prosecution evidence and he had further stated that, he had not committed any offence and he has been falsely implicated in the case. Since the evidence in the case did not warrant an acquittal under Section 232 of the Code of Criminal Procedure, the Additional Sessions Judge directed the accused 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 there under and sentenced him to undergo rigorous imprisonment for two years and also to pay a fine of ₹1,00,000/-, in default to undergo simple imprisonment for six months more. Set off was allowed for the period of detention already undergone by him in this case. Aggrieved by the same, the present appeal has been preferred by the appellant/accused before the court below.

5. Heard Smt.T.S. Remya, Adv. representing

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

6. The counsel for the appellant submitted that there is some discrepancy in the date of detection mentioned by the witnesses and also the date mentioned in the documents that create some doubt regarding the genuineness of the prosecution case. Further independent witness to the seizure did not support the case of the prosecution. It is not safe to rely on the official witness alone to convict the accused. Further the seizure was not informed to the higher officials as contemplated under Section 38 of the Abkari Act. That also create doubt regarding the genuineness of the prosecution case. The nature of seal used is not mentioned in the seizure mahazar and as such it cannot be said that the prosecution has proved the articles have reached the court in a tamper free condition and the court below was not justified in convicting the appellant for the offence alleged. Learned counsel also

submitted that the sentence imposed is also harsh.

7. Learned Public Prosecutor submitted that the evidence adduced on the side of the prosecution has proved the case against the accused beyond reasonable doubt and there was no delay in producing the article and as such court below was perfectly justified in convicting the appellant for the offence alleged.

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

On 06.07.2000 at about 12.30 p.m., PW1 the Excise Inspector attached to Special Squad of Excise Department was doing patrol duty along with PW2 and when they 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 the place, so he stopped him and on examination of the cannas, he found that it contained full of some liquid, which on further examination by smelling and tasting, he was satisfied that it was arrack. He took 180 m.l. liquid in a 375 ml. bottle as

sample and sealed the same and affixed label containing the signature of witnesses, himself and the accused. He had sealed the kannas and also label the same in the same fashion and seized the same as per Ext.P1 mahazar in the presence of PWs 4 and another. Thereafter he arrested the accused and prepared Ext.P2 arrest memo and gave arrest intimation to his wife who came there and thereafter he came to Quilandy excise office along with accused and the contraband articles seized and produced the accused and the articles before PW5/ the Excise Inspector, Quilandy Excise Range. On the basis of the documents produced, he registered Ext.P4 crime and occurrence report as crime No.11/2000 of Quilandy Excise Range against the accused under Section 55(a) of the Abkari Act and he prepared Ext.P6 property list and produced the accused along with Ext.P5 remand report on the same day. He produced the articles along with Ext.P6 property list before the court on the same day. He sent Ext.P7 forwarding note with a request to send the sample for chemical analysis and the

sample was sent from court to chemical examiner's laboratory and Ext.P8 chemical analysis report obtained. He questioned the witnesses and recorded the statement. As per his request, PW3/ the Village Officer had prepared Ext.P3 sketch and plan of the place of occurrence. He collected Ext.P8 chemical analysis report and produced the same before court. He completed the investigation and submitted final report.

9. PW1 is the independent witness to the seizure. He had admitted the signature in Ext.P1, though he had denied having seen the seizure of the arrack from the possession of the accused. He had admitted that he had seen the accused with the excise officials when he signed Ext.P1. He has also stated that he knew the accused. So it is clear from this that he had seen the actual seizure and signed the mahazar, but he is now trying to help the accused and that was the reason why he is denying the witnesses and seizure of contraband article from the possession of the accused.

10. Then the evidence is that of PWs 1 and 2, the detecting officer and the preventive officer who accompanied him. PW1 is the Excise Inspector of Special Squad, Kozhikode Excise Department. He was doing patrol duty 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 officials, he tried to go away from the place. So he stopped him and examined the contents of the cannas and satisfied that it was arrack. Thereafter he took sample, sealed and labeled the bottle and thereafter sealed and labeled the cannas also and seized the same as per Ext.P1 mahazar. He arrested the accused and prepared Ext.P2 arrest memo and gave intimation of his arrest to his wife. Thereafter he came to excise office, Quilandy and produced the accused and contraband article before PW5, who registered the crime and conducted the investigation. The evidence of PW1 on these aspects were corroborated by the evidence of PW2, the preventive officer who accompanied him. Though they

were cross examined at length nothing was brought out to discredit their evidence regarding the seizure of MO1 kannas and arrest of the accused.

11. It is true that in the evidence, the date of occurrence was mentioned as 07.06.2000, but it could only a mistake, considering the date of occurrence mentioned by PWs 2 and 5 and also the date mentioned in the documents prepared at the time of seizure. So that cannot be a ground for acquittal of the accused. There is nothing brought out to discredit the evidence of PWs1 and 2 regarding the arrest of the accused and seizure of MO1 kannas from his possession. So the court below was perfectly justified in coming to the conclusion that prosecution has proved the case beyond reasonable doubt that the accused was arrested along with MO1 kannas.

12. Further it is seen from the evidence of PW5 that the accused as well as the contraband articles were produced before court on the same day, which is seen from Ext.P6 property list and Ext.P5 remand report. Further it is

seen from Ext.P7 that, it contains the specimen seal impression of the seal used for sealing the sample and Ext.P8 chemical analysis report shows that the specimen seal provided tallied with the seal seen on the bottle. So that shows that the article reached the court and the chemical analysis report is without any tampering and the chemical analysis report represents the representative sample taken from the contraband article seized from the possession of the accused. So it is clear from the evidence that the article seized was arrack which is not disputed as well. So under the circumstances, court below was perfectly justified in convicting the appellant for the offence under Section 55(a) of Abkari Act (ought to be under Section 8(1) and (2) of the Abkari Act), as possession of arrack after amendment is an offence punishable under Section 8(1) and (2) of the Abkari Act.

13. Section 38 of the Abkari Act reads as follows:

**38. Offences to be reported, etc.-** Every [Officer of Government] other than an Abkari Officer, shall be bound to give immediate information to an Abkari Officer, and

every Abkari Officers shall be bound to give immediate information either to his immediate official superior or to an Abkari Inspector, of all breaches of any of the provisions of this Act, which may come to his knowledge; and all such officers shall be bound to take all reasonable measures in their power to prevent the commission of any such breaches which they may know or have reason to believe are about or likely to be committed.

14. It only says that every officer of the Government other than the Abkari Officer who came to know about the commission of the offence is duty bound to inform his superior officer so as to prevent the commission of the offence. In this case, the detection was made by an abkari officer and immediately after seizure, it was reported to the officer having jurisdiction to register a crime and the arrest as well as seizure were reported to the court on the same day. So there is no violation of Section 38 arises in this case as submitted by the counsel for the appellant.

15. The counsel for the appellant submitted that the sentence imposed is harsh and the court below sentenced the accused to undergo rigorous imprisonment for two years and also to pay a fine of ₹1,00,000/-, in default to undergo simple imprisonment for six months. Set off was

allowed for the period of detention already undergone by him under Section 428 of the Code of Criminal Procedure.

16. The persons who are committing the offences under the Abkari Act are committing the same knowing that what was done by them is an offence, ignoring the consequences of their act on innocent people who are consuming illegally manufacturing arrack. Showing undue leniency in such cases will only give a wrong message to the society and it will cause loss of confidence to the public in the criminal justice delivery system. But at the same time, the antecedents of the accused, possibility of reformation, quantity of contraband article seized etc., can be taken note of by the court while fixing the sentence to be passed for the offence alleged. In this case the accused was aged only 37 years at the time when the offence was committed and the prosecution has no case that he had involved in any other crime of similar nature. It cannot be said that he is a habitual offender and there is no possibility for reformation as well. So considering the circumstances, this court feels

that the substantive can be reduced to 9 months simple imprisonment and default sentence can be reduced to three months simple imprisonment while retaining the fine imposed and that will meet the ends of justice. So substantive sentence of two years rigorous imprisonment and default sentence of six months simple imprisonment imposed by the court below are set aside and the same is modified as follows:

The appellant is sentenced to undergo rigorous imprisonment for 9 months and also to pay a fine of ₹ 1,00,000/-, in default to undergo simple imprisonment for three months. Set off is allowed for the period of detention already undergone by him.

So the appeal is allowed in part. The order of conviction passed by the court below under Section 55(a) of the Abkari Act (ought to be under Section 8(1) read with Section 8(2) of the Abkari Act) and sentence of fine of ₹1,00,000/- imposed by the court below are hereby confirmed. But the substantive sentence of 2 years rigorous

imprisonment and default sentence of six months simple imprisonment are set aside and the same is modified as follows:

The appellant is sentenced to undergo rigorous imprisonment for 9 months and also to pay a fine of ₹1,00,000/-, in default to undergo simple imprisonment for three months. Set off is allowed for the period of detention already undergone by him.

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

Sd/-

**K. Ramakrishnan, Judge**

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P.A. to Judge

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