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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 31ST DAY OF AUGUST 2015/9TH BHADRA, 1937

CRL.A.No. 1407 of 2005 ()

AGAINST THE JUDGMENT IN SC 941/2000 of ADDL.SESIONS COURT-TRIAL OF
ABKARI ACT CASES, NEYYATTINKARA DATED 11-08-2005

AGAINST THE ORDER IN CP 16/2000 of J.M.F.C.-II, NEYYATTINKARA

APPELLANT:

AMBIKA ALIAS SANTHA, D/O. BHAVANI,
MANAPAZHANJI LAKSHAM VEEDU, KULATHOOR DESOM
KULATHOOR VILLAGE, NEYYATTINKARA.

BY ADVS.SRI.C.RAJENDRAN
SRI.D.SAJEEV

RESPONDENT/COMPLAINANT::

STATE OF KERALA, REPRESENTED
BY THE EXCISE INSPECTOR, THIRUPURAM RANGE
THROUGH PUBLIC PROSECUTOR, HIGH COURT OF KERALA
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.JIBU P.THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 31-08-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. RAMAKRISHNAN, J.

.....
Crl.A.No.1407 of 2005
.....

Dated this the 31st day of August, 2015.

“CR”

JUDGMENT

The accused in SC.No.941/2000 on the file of the Additional Sessions Court for the trial of Abkari Act Cases, Neyyattinkara is the appellant herein. The appellant was charge sheeted by the Excise Inspector, Thirupuram Excise Range in Crime No.48/1998 under section 58 of the Abkari Act (it could be only a mistake as it ought to be under section 8(1) read with section 8(2) of the Abkari Act).

2. The case of the prosecution in nutshell was that on 24.9.1998, at about 2 p.m, the appellant was found to be in possession of 7 litres of arrack in MO1 cannas and found transiting the same along the western side of Kulathoor-Uchakkada road in front of Uchakkada Roman Catholic Church, Kulathoor in violation of the provisions of the Abkari Act and thereby by she had committed the offence mentioned above.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court-II, Neyyattinkara and the learned Magistrate had committed the case to Sessions Court,

Thiruvananthapuram as per order in C.P.No.16/2000 under section 209 of the Code of Criminal Procedure (hereinafter referred to as 'the Code'). After committal, the Sessions Court took cognizance of the case as SC.No.941/2000 and made over the case to the Additional Sessions Court for trial of Abkari Cases, Neyyattinkara for disposal.

4. When the appellant appeared before the court below, after hearing both sides, charge under section 58 of the Abkari Act was framed against her and the same was read over and explained to her and she pleaded not guilty. In order to prove the case of the prosecution, Pws 1 to 5 were examined and Exts.P1 to P6 and MO1 were marked on their side. After closure of the prosecution evidence, the appellant was questioned under section 313 of the Code and she denied all the incriminating circumstances brought against her in the prosecution evidence. She had further stated that she had not committed any offence and she 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 learned Additional Sessions Judge directed the appellant to enter on her defence,

but no defence evidence was adduced on her side. After considering the evidence on record, the court below found the appellant guilty under section 58 of the Abkari Act and convicted her thereunder and sentenced her to undergo rigorous imprisonment for two years and also to pay a fine of Rs. One lakh, in default to undergo simple imprisonment for three months. Aggrieved by the same, the present appeal has been preferred by the appellant/accused before the court below.

5. Heard Sri. C. Rajendran, learned counsel appearing for the appellant and Sri. Jibu P. Thomas, Public Prosecutor appearing for the State.

6. Counsel for the appellant submitted that there was no spot sample taken and there is no evidence to show that chemical analysis report relates to the representative sample taken from the contraband article alleged to have been seized from the possession of the appellant. In the absence of such evidence, it cannot be said that the prosecution has proved beyond reasonable doubt that the appellant was found to be in possession of illicit arrack. Further, there is contradiction in

the quantity seized as mentioned in the seizure mahazer and also in the final report filed. That also gives suspicion regarding genuineness of the prosecution case. He had also argued that independent witnesses turned hostile and the court below was not justified in relying on the official witnesses alone to convict the appellant and he had relied on the decision reported in ***Sasidharan v. State of Kerala*** (2007 (1) KLT 720) in support of his case.

7. On the other hand, learned Public Prosecutor argued that in this case there was no delay in producing the article and in fact, the property clerk, who had taken the sample was examined before court and he had narrated the procedure followed in drawing the sample, sealing the same and sending the same to chemical examiner's office. In this case, sample was taken on the same day and it reached the chemical examiner's office on the same day. So there is no delay in taking sample and the 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 24.9.1998 while PW4, the Excise Inspector was doing patrol duty along with PW2 excise guard and when they reached the place of occurrence, they saw the appellant coming with MO1 kannas in her hand and on seeing the excise party, she tried to move away from the place in a perplexed state. So they stopped her and on verification of the MO1 kannas in the presence of Pws 1 and 3, he was satisfied that it was arrack and it was a 10 liter kannas containing 7 litres of arrack. He thereafter sealed the same and labelled the same and arrested the accused and prepared Ext.P3 arrest memo and gave arrest intimation to her husband. Thereafter he seized MO1 kannas as per Ext.P1 mahazer in the presence of PWs1 and 3. Thereafter he came to the office along with the appellant and contraband articles seized and prepared Ext.P2 crime and occurrence report as Crime No.48/1998 of Thirupuram Excise range under sections 55(i) and 8(1) of the Abkari Act. He produced the articles before court along with Ext.P4 property list on the same day. He produced the appellant before court on the same day along with remand report and she was remanded to custody. As per the request of the excise officials,

PW5 took sample after getting orders from the Magistrate and entered the same in the original of Ext.P6 thondy register and entrusted the same to the excise guard for the purpose of sending it to chemical examiner's laboratory on the same day and later Ext.P5 report obtained. The successor of PW4 filed the final report before court.

9. Pws 1 and 3 are the alleged eye witness to the seizure. Though PW1 admitted his signature in Ext.P1, he denied having seen the seizure. PW3 had denied even the signature and according to him, he used to sign in Malayalam. But when his signature in the summons was shown, it was seen signed in English which tallied with the signature in Ext.P1 mahazer and he did not deny the same as well. 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 regarding seizure of the articles. So, the only evidence available regarding seizure is that of evidence of excise officials who detected the crime and excise officials who accompanied the detecting officer. PW4 is the detecting officer in this case. He had categorically stated that on 24.9.1998, at about 2 p.m, while

he was doing patrol duty and when they reached the place of occurrence, he saw the appellant coming with MO1 kannas in her hand and on seeing the excise party, she found perplexed and tried to go away from the place and they stopped her and examined the contents of the kannas in the presence of Pws 1 and 3 and satisfied that it was arrack. It was a 10 liter kannas containing 7 litres of liquid which according to him, was illicit arrack. He had further stated that he arrested the appellant and prepared Ext.P3 arrest memo and intimated the same to her husband, He sealed MO1 kannas and affixed label containing signature of the appellant, witnesses and himself and seized the same as per Ext.P1 seizure mahazer. Thereafter he came to office along with the accused and the contraband article seized and registered Ext.P2 crime and occurrence report against the appellant and prepared Ext.P4 thondy list and forwarded the same to the court along with requisition to take sample and sent for analysis along with forwarding note. He produced the appellant before court along with remand report and she was remanded to custody. He had further stated that sample was taken from court and it was sent for analysis from

court and Ext.P5 certificate obtained which shows that it contained 31.31% by volume of ethyl alcohol. Though he was cross examined at length, nothing was brought out to discredit his evidence regarding this aspect. It is true, in the final report it was mentioned that quantity of article seized is 10 litres. But he had explained that final report was filed by his successor and it could only be a mistake.

10. PW2, the excise guard, who accompanied PW4 had corroborated the evidence of PW4 regarding seizure of MO1 along with arrack from the possession of the appellant and arrest of the accused. Though he was cross examined at length, nothing was brought out to discredit his evidence. It is settled law that even if independent witnesses to the seizure turned hostile, there is nothing for the court to rely on the official witnesses to convict the appellant if the court is satisfied with genuineness of the evidence adduced by the official witnesses. This is so held in the decision reported in ***Sabu v. State of Kerala*** (2007 (4) KLT 169). In this case there is nothing brought out to disbelieve the evidence of Pws 2 and 4 regarding this aspect. So under the circumstances, the court

below was perfectly justified in coming to the conclusion that prosecution has proved beyond reasonable doubt that the appellant was arrested by PW4 along with MO1 kannas containing 7 litres of liquid, which according to the prosecution, was illicit arrack.

11. Counsel for the appellant submitted that the nature of seal used has not been provided. It may be mentioned here that article was produced before court on the same day of seizure along with Ext.P4 property list. It is true that in Ext.P4 it was not mentioned that it was a sealed kannas. But if it is not properly sealed, then it would have been returned by the office. But that was not done in this case. Further there was no delay in producing the article before court as on the same day of seizure it was produced before court which was evident from Ext.P4 and also the endorsement in Ext.P6 coupled with the evidence of PW5, the thondy clerk, who received the same and entered in the original of Ext.P6 register. Further, PW5 had categorically stated that as per the request of the excise officials, he had drawn sample after getting necessary orders from the magistrate and thereafter sealed the same with the

seal of the court and signature of the then Magistrate and forwarded the same to the chemical examiner's laboratory through excise guard on the same day along with covering letter of the magistrate containing signature of the magistrate. It will be seen from Ext.P6 that the sample was drawn on 28.9.1998 and on the same day it was entrusted to the excise guard and it will be seen from Ext.P5 chemical analysis report that it reached that office on the same day. So that shows that there was no delay in drawing the sample and reaching the chemical examiner's laboratory for examination which shows that it reached the court as well as the chemical examiner's laboratory in a tamper free condition.

12. It is true that in the decision reported in **Sasidharan's** case (cited supra) it was 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. In this case thondy clerk was examined as PW5 and he had deposed the procedure adopted for drawing sample and sending the same to the chemical examiner's laboratory. There was no much cross examination of this witness on this aspect. That shows that the sample was drawn in accordance with law and it was sent for examination in a tamper proof condition and it was taken from the liquid found in MO1 kannas which was produced in court on the same day of detection, which was produced immediately before court in a tamper proof condition to the satisfaction of the court. So, under the circumstances, the court below was perfectly justified in coming to the conclusion that sample was sent for examination from court in accordance with law in a tamper proof condition and the report obtained represents the representative sample taken from the contraband article alleged to have been seized from the possession of the appellant and rightly convicted her for

the offence for possession of arrack and transiting the same in violation of the provisions of the Abkari Act.

14. It may be mentioned here that after 3.6.1997, possession of arrack itself is an independent offence punishable under section 8(1) read with section 8(2) of the Abkari Act and not under section 58 of the Abkari Act. So framing of charge entering conviction for the offence under 58 is only a mistake and converting the same for the offence under section 8(1) will not cause any prejudice to the accused as well. So the accused is found guilty for the offence under section 8(1) instead of section 58 as found by the court below.

15. Counsel for the appellant submitted that the sentence imposed is harsh. The court below sentenced her to undergo rigorous imprisonment for two years and also to pay a fine of Rs.One lakh, in default to undergo simple imprisonment for three months. As regards abkari offences are concerned, persons who are committing the offence are doing the same knowing that it is an offence and also ignoring the impact of their act on the innocent persons who are consuming the same and showing undue leniency on such persons will result in

sending a wrong message to the society itself. However, there is no case for the prosecution that she is a habitual offender of committing similar offence. No such evidence was adduced as well. She was a lady aged 30 years at that time. So, considering the circumstances, this court feels that reducing substantive sentence to one year rigorous imprisonment will be sufficient apart from the minimum fine of Rs. One lakh imposed and that will meet the ends of justice. So, while confirming the fine of Rs. One lakh with default sentence of three months simple imprisonment, the substantive sentence of two years rigorous imprisonment is reduced to one year rigorous imprisonment. So the sentence is modified as follows:

The appellant is sentenced to undergo rigorous imprisonment for one year and also to pay a fine of Rs. One lakh, in default to undergo simple imprisonment for three months. Set off is allowed for the period of detention already undergone under section 428 of the Code.

So the appeal is allowed in part. The order of conviction passed by the court below is converted to one under section 8(1) read with section 8(2) of the Abkari Act instead of section

58 of the Abkari Act as found by the court below and sentence of fine of Rs. One lakh with default sentence of simple imprisonment for three months is hereby confirmed. The substantive sentence of two years rigorous imprisonment is set aside and the same is reduced to one year rigorous imprisonment. So, the appellant is sentenced to undergo rigorous imprisonment for one year and also to pay a fine of Rs. One lakh, in default to undergo simple imprisonment for three months under section 8(1) read with section 8(2) of the Abkari Act.

With the above modifications of the sentence alone, the appeal is allowed in part.

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

Sd/-

K. RAMAKRISHNAN, JUDGE.

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P.S to Judge

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