IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

FRIDAY, THE 9TH DAY OF OCTOBER 2015/17TH ASWINA, 1937

CRL.A.No. 1433 of 2005 ( )

AGAINST THE JUDGMENT IN SC 566/2003 of ADDL.DISTRICT COURT (ADHOC), ALAPPUZHA DATED 08-08-2005

APPELLANT/ACCUSED::

CHACKO THOMAS
KOCHUKALASSERIL, ATTUVATHALA MURI,
KAINAKARY VILLAGE.

BY ADV. SRI.S.SANAL KUMAR
BY ADV.SMT. BHAVANA VELAYUDHAN

RESPONDENT/COMPLAINANT::

STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTORSRI.JIBU P.THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 09-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. RAMAKRISHNAN, J.

....

Crl.A.No.1433 of 2005

....

Dated this the 9th day of October, 2015.

JUDGMENT

The accused in S.C.No.566/2003 on the file of the Additional Sessions Court (Fast Track-I), Alappuzha is the appellant herein. The appellant was charge sheeted by the Excise Inspector, Kuttanad Excise Range under sections 55(a) and 8 of the Abkari Act.

2. The case of the prosecution in nutshell was that on 20.11.1998, at about 7 p.m, the accused was found to be in possession of 2.850 litres of arrack in his tea shop near St. Mary's Church, Kainakari in violation of the provisions of the Abkari Act and thereby he had committed the offence punishable under sections 8 and 55(a) of the Abkari Act.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court, Ramankari where it was taken on file as C.P.No.5/2003. After complying the formalities, learned Magistrate committed the case to Sessions Court, Alappuzha 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.566/2003 by the Sessions Court and it was made over to the Additional Sessions Court (Adhoc-1), 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 have been under section 8(1) read with section 8(2) 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 P9 and Mos 1 series and Mos2 and 3 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 was not the owner of the tea shop and it was rented out to some other persons and no article was seized from his possession and in fact it was taken from the house which is situated behind the tea shop and falsely implicated in the case. Since evidence in the case did not warrant an acquittal under section 232 of the Code, accused was called upon to enter on his defence. Dws 1 and 2 were examined and Exts.D1 and D2 were marked on the side of the accused to prove his case.

5. After considering the evidence on record, the court below rejected the evidence of Dws 1 and 2 and Exts.D1 and D2 and accepted the evidence of the prosecution and found the appellant guilty under section 55(a) of the Abkari Act (ought to be under section 8(1) of the Abkari Act) and convicted him thereunder and sentenced him to undergo rigorous imprisonment for two years and also to pay a fine of Rs. One lakh, in default to undergo simple imprisonment for six months more. Set off was allowed for the period of detention already undergone under section 428 of the Code. Aggrieved by the same, the above appeal has been preferred by the appellant/ accused before the court below.

6. Heard Smt. Bhavana Velayudhan, counsel representing Sri.S. Sanal Kumar, counsel appearing for the appellant and Sri. Jibu P. Thomas, Public Prosecutor appearing for the State.

7. Counsel for the appellant submitted that the court below was not justified in rejecting the defence evidence adduced to prove that he was not the owner of the tea shop

and it belonged to his son and it was rented out to DW2 and as such, his presence in the tea shop as claimed by the prosecution cannot be believed. He had also argued that only one sample was taken though according to the prosecution four bottles containing arrack was seized. There was delay in producing the article which has not been properly explained and that benefit must be given to the accused. These aspects were not properly considered by the court below before convicting the appellant for the offence alleged.

8. On the other hand, the learned Public Prosecutor submitted that PW1 had categorically stated that he was in possession of the article till it was produced in court. So there is no possibility of tampering and the delay has been explained and the court below was perfectly justified in rejecting the evidence of Dws 1 and 2 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 20.11.1998 while PW1, the Preventive Officer attached to Kuttanad Excise Rage, was doing patrol duty along with

PW2, another Preventive Officer and party, they got information that accused was selling arrack from his tea shop. So he sent Ext.P1 search memorandum to court and thereafter went to the place and conducted search of the tea shop of the accused in the presence of Pws 3 and 4 and the accused was also present in the shop. On examination, they found that 4 bottles of 750 ml each capacity were kept in the kitchen portion to the tea shop of which three bottles contained 750 ml liquid, while other bottle contained 600ml liquid and a glass nearby. On examination of the contents of the bottles which were later identified as MO1 series and MO2, they were satisfied that it was arrack. MO3glass also contained the smell of arrack. So they seized the same as per Ext.P3 search list. Thereafter he took sample from MO2 bottle containing 600 ml arrack and sealed the same and affixed label on the same containing signature of the accused, witnesses and himself and he seized bottles after sealing and affixing labels as mentioned above. Thereafter he seized Mos 1 to 3 and sample bottle as per Ext.P2 mahazer in the presence of Pws 3 and 4. He arrested the accused and prepared Ext.P6 arrest memo. He came to the excise office and registered Ext.P4 crime and occurrence report as Crime No.38/1998 under sections 55(a) and 8(1) of the Abkari Act against the accused. He produced the accused before court along with remand report. He prepared Ext.P5 property list and produced the same before court along with requisition for sending the articles for analysis and the same was sent from court for analysis and Ext.P7 chemical analysis report obtained which shows that sample contained 67.48% by volume of ethyl alcohol which is much higher than the standard provided for the arrack. The investigation in this case was conducted by PW5, the Excise Inspector. He questioned the witnesses and recorded their statements. He collected Exts.P8 and P9 documents showing ownership of the tea shop and completed investigation and submitted final report after collecting chemical analysis report.

10. Pws 3 and 4 are the independent witnesses to the seizure. Both Pws 3 and 4 had stated that they knew the accused and his tea shop. PW3 admitted his signature in Ext.P2 and P3 while PW4 admitted his signature in Ext.P6 arrest memo. He had also stated that he knew the accused and

tea shop of the accused. So it is clear that accused is the owner of the tea shop and that was the reason that they have stated that they knew the tea shop of the accused. So it is clear from this that they are now trying to support the accused and that was the reason why they are denying the case of the prosecution in order to help the accused.

11. Then the evidence available is that of Pws 1 and 2, the detecting officer and the officer who accompanied the detecting officer. PW1 had categorically stated that he got information that the accused was selling arrack from his tea shop. Immediately he sent Ext.P1 search memorandum to court and thereafter went to the shop and conducted search and found MO1 series and MO2 bottles and MO3 glass containing total quantity of 2.850 litres of liquid which on verification they were satisfied that it was arrack. Thereafter, he arrested the accused, seized articles as per Ext.P3 search list and prepared sample, sealed labelled and seized the articles as per Ext.P2 mahazer. Evidence of PW1 was corroborated by the evidence of PW2, another Preventive Officer attached to the same excise office, who accompanied

him for conducting the search. Though they were cross examined at length, nothing was brought out to discredit their evidence on this aspect. The fact that he was arrested was proved by Ext.P6 arrest memo and the signature of the witness to the arrest namely PW4 was also admitted by the witness. So he was arrested from his house as claimed by him cannot be believed. So the evidence of prosecution is sufficient to come to the conclusion that they have proved beyond reasonable doubt that the search was conducted and Mos 1 to 3 were seized from that shop and search and arrest were proper and legal.

12. The accused had examined the secretary of the panchayat as Dw1 and relied on Ext.D1 certificate given by him and also evidence of DW2 and Ext.D2 said to have been executed to prove that he is not the owner of the tea shop. But Ext.D1 was of the year 2000-05. The incident in this case occurred in the year 1998. It was brought out in the evidence of PW5 that Ext.P8 is the building tax register in respect of this building and if it is a rented building, the name of the tenant will be mentioned there and he had also stated that

Ext.P8 is a genuine document. Further certificate given by DW1 is of the year 2000-05 which is much after the incident. So that is not relevant and that is not helpful to prove that the accused was not the owner of the tea shop at the relevant time.

13. Further it will be seen from the evidence of Dw2 that except Ext.D2, he had no other document to show that he is conducting tea shop in that room. Further according to him it was signed by one witness by name Kunhumon but no such person was shown as witness in Ext.D2. It is not known as to how he was in possession of original rent deed. He had not produced any document showing that he is paying any rent. So court below was perfectly justified in coming to the conclusion that Exts.D1 and D2 are subsequently created to prove the case of the accused and that cannot be relied for the purpose of exonerating the accused to come to a conclusion that he was not the owner of the tea shop as claimed by him.

14. Mere seizure of some bottle containing liquid alone is not sufficient to attract the offences against the accused. It must further be proved by the prosecution that the articles produced before court were the same articles and chemical

analysis report relates to the representative sample said to have been taken from the contraband liquor seized from the possession of the accused. In this case it is seen from the evidence of PW1 that articles were produced before court only on 23.11.1998 which is clear from Ext.P5 property list as well. He had no explanation for the delay though he had stated that he was in possession of the same till it was produced in court. That alone is not sufficient to come to the conclusion that there was no possibility of tampering before it was produced in court as what is required in law is to produce the articles before court without delay.

15. It is also settled law that mere delay in producing the articles before court alone is not always fatal and sufficient for acquittal of the accused. If delay has been properly explained by the investigating agency, the court can ignore the delay. Otherwise the benefit must be given to the accsued. In the decision reported in ***Ravi v. State of Kerala and another*** (2011 (3) KHC 121) a Division Bench of this Court has considered the scope of section 36 of the Abkari Act regarding production of the article before court and observed

that mere delay in producing the article alone is not sufficient to doubt the genuineness of the case of the prosecution. If the delay has been properly explained, then court can ignore the delay and accept the case of the prosecution. But if the delay has not been explained, then that benefit must be given to the accused.

16. In this case neither in Ext.P2 nor in Ext.P3 any label was affixed. It was only mentioned that seal was affixed. But at the time of evidence, both Pws 1 and 2 had stated that a label was seen affixed containing the signature of the accused, themselves and the witnesses. But no such label was seen mentioned either in Ext.P2 or P3 or in the property list. That also shows that the possibility of tampering before it was produced in court cannot be ruled out. In the absence of any explanation given by the prosecution for non production of the article along with the accused, it cannot be said that the prosecution has proved beyond reasonable doubt that chemical analysis report relates to the representative sample collected from the contraband article said to have been seized from the possession of the accused so as to establish the link between

the accused and the contraband article and it cannot be said that the prosecution has succeeded in bringing home the complicity of the accused in the commission of the offence so as to convict him for the said offence. This aspect has not been properly considered by the court below. Court below has only stated that mere delay alone is not sufficient when PW1 had stated that he had in possession of the same. But in view of the dictum laid down in **Ravi's case** that he has no sufficient reason for the delay and it must be explainable by the detecting officer and in the absence of the same that benefit must be given to the accused. So under the circumstances, it cannot be said that the prosecution has proved beyond reasonable doubt that the accused was found to be in possession of the arrack and conviction entered by the court below is unsustainable in law and the same is liable to be set aside and 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 accused is entitled to get acquittal, the sentence imposed is not proper and the same is liable to be 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) 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 lower court is directed to refund the fine amount, if any remitted by the appellant to him on making such an application for that purpose.

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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