

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

FRIDAY, THE 20TH DAY OF NOVEMBER 2015/29TH KARTHIKA, 1937

CRL.A.No. 1787 of 2004 ( )

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AGAINST THE JUDGMENT IN SC 422/2003 of ADDITIONAL DISTRICT COURT  
(ADHOC), PATHANAMTHITTA, DATED 30-09-2004.

APPELLANT(S)/ACCUSED:

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JOSE, S/O.YOHANNAN, PALANILKUNNATHIL VEEDU,  
CHENGARA EARM MURI, MALAYALAPPUZHA VILLAGE,  
KOZHENCHERRY TALUK, PATHANAMTHITTA DISTRICT.

BY ADV. SRI.V.PHILIP MATHEW

RESPONDENT(S)/COMPLAINANT:

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

BY ADV. C.T.JESTIN [STATE BRIEF]  
PUBLIC PROSECUTOR SRI.JIBU P.THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 20-11-2015,  
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SS

**K. RAMAKRISHNAN, J.**

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Crl. Appeal No.1787 of 2004  
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Dated this the 20<sup>th</sup> day of November, 2015

**JUDGMENT**

Accused in S.C.No.422/2003 on the file of the Additional Sessions Judge (Adhoc-II), Pathanamthitta, is the appellant herein. The appellant was charge-sheeted by the Sub Inspector of Police, Konni in Crime No.373/2001 of that police station, under Section 8(1) & (2) of Abkari Act.

2. The case of the prosecution in nut shell was that, on 04.11.2001 at about 05.35 p.m., the accused was found to be in possession of 3 liters of arrack in a five liter can and engaged in sale of the same on the northern boundary of rubber estate situated on the southern side of Nadukani - Michaboomi road, in violation of the Provisions of Abkari Act and thereby he had committed the offence punishable under Section 8(1) read with Section 8(2) of the Kerala Abkari Act.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court-II, Pathanamthitta, and the case was taken on file as C.P.No.175/2001 on the file of that court. Thereafter it was committed to the Sessions Court, Pathanamthitta, by the learned magistrate under Section 209 of the Code of Criminal Procedure (hereinafter called the Code). After committal, the case was taken on file as S.C.No.422/2003 by the Sessions Judge and thereafter it was made over to the Additional Sessions Court (Adhoc-II), Pathanamthitta, for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge 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, P1(a), P1(b), P2(a), P2(b) and MOs 1 and 2 were marked on the side of the prosecution. 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, no article was seized from his possession. He was a jeep driver by profession. On 15.04.2002 while he was taking the vehicle in the reverse direction, there was some altercation occurred between him and the Sub Inspector of Konni, stating that his act had caused obstruction to the police jeep and he was taken to police station and beaten. When union members came and insisted for release him on bail, it was refused and thereafter using the articles in the police station, a false case has been foisted against him. Since the evidence in this case did not warrant an acquittal under Section 232 of the Code, the Additional Sessions Judge directed the accused to enter on his defence. DWs 1 and 2 were examined on his side in defence to prove his case and Ext.D1 was marked through PW5. After considering the evidence on record, the court below found the appellant guilty 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 ₹1,00,000/-, in default to undergo simple imprisonment for one year 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 Sri.Jibi Georoge, counsel representing Adv. Sri.Philip Mathews, counsel appearing for the appellant and Sri.Jibu P. Thomas, learned Public Prosecutor appearing for the State.

6. The counsel for the appellant submitted that, detection and investigation in this case were conducted by the same officer, that could not have done by him, especially when the accused had a case that on account of some enmity with him, he has been falsely implicated by the sub Inspector that caused prejudice to him. Further the nature of seal used was not mentioned and there is some discrepancy in the evidence of PWs 3 to 5 in respect of the

same. The nature of seal used is not mentioned in the seizure mahazar. The specimen seal impression of the seal was not produced and PW5 had admitted that he had not taken specimen seal impression of the seal. The forwarding note was not marked in the case. So under the circumstances, it cannot be said that the articles which were said to have been seized reached the court in a tamper free condition and Ext.P8 relates to the representative sample said to have been taken from the contraband article alleged to have been seized from the possession of the accused. Further it was not mentioned in Ext.P7 property list that, the sample bottle contains arrack said to have been taken from the can seized from the possession of the appellant. The court below had not properly appreciated the evidence of DWs 1 and 2 on the aspect to substantiate the defence taken by him. So the court below was not justified in convicting the appellant and he is entitled to get acquittal.

7. On the other hand, learned Public Prosecutor

submitted that, there was no delay in producing the article and it was specifically mentioned that the label was affixed on the contraband articles and they were produced in court without delay and PW5 had stated that the labels were seen in the articles produced. There is nothing to disbelieve the evidence of PWs 3 to 5 on this aspect. So according to the learned Public Prosecutor, 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 04.11.2001 at about 05.30 p.m., while PW5, the Sub Inspector of Police, Konni police station was doing patrol duty along with PWs 3 and 4 and when they reached near the place called Nadukani, they got information that the accused was selling arrack from a nearby rubber estate and accordingly they went to the spot and saw the accused standing there holding MO1 cannas and MO2 glass in his hand and three persons were standing near him and on seeing the police party, the persons standing near him ran

away from the place. Though they chased them, they could not arrest them. Though the accused tried to run away from the place, they stopped him. On examination of the kannas in the presence of PWs 1 and 2 by PW5, it was found that it contained three liters of some liquid which on further examination he was satisfied that it was arrack. He took sample of 175 ml., in a 375 ml bottle and sealed the same and affixed label containing the signature of himself, witnesses and the accused and sealed and labelled the kannas also in the same fashion and thereafter seized MOs 1 and 2 and the sample bottle as per Ext.P3 seizure mahazar in the presence of PWs 1 and 2. He arrested the accused from the spot and prepared Ext.P5 arrest memo and gave arrest intimation to his brother. He prepared Ext.D1 inspection memo after conducting body search of the accused. Thereafter he came to police station along with the accused and the contraband articles and registered Ext.P4 first information report as Crime No.373/2001 of Konni police station against the accused under Section 8(1)

and (2) of Abkari Act. He produced the accused along with Ext.P6 remand report before the court on the next day. He prepared Ext.P7 property list and produced the articles before court on the next day. He questioned the witnesses and recorded their statements. On the basis of his request, the sample was sent from court to chemical examiner's lab and Ext.P8 chemical analysis report obtained, which shows that, the sample contained 32.99% by volume of ethyl alcohol. He completed the investigation and submitted final report.

9. PWs 1 and 2 are independent witnesses. They have denied having seen the seizure and arrest of the accused. They have even denied the signature in Ext.P3 mahazar. They denied having stated in Ext.P1 series and P2 series statements respectively said to have been recorded by the investigating officer, when they were questioned by him. But it was brought out in their evidence that they knew the accused as jeep driver in that locality. So it is clear from their evidence that they were trying to help the

accused and that was the reason why they were not supporting the case of the prosecution.

10. Then the evidence available to prove the arrest and seizure is that of PW5, the detecting cum investigating officer and PWs 3 and 4 the police constables who accompanied him. PW5 had categorically stated that, on that day at about 5.30 p.m., he was doing patrol duty along with PWs 3 and 4 and others and when he reached the Nadukani junction, he got information that accused was selling arrack from the estate by name Chemmani estate. Immediately they went to that place and they saw the accused standing there with MO1 kannas and MO2 glass in his hands and three persons were standing near him and on seeing the police party, those three persons ran away from the place. Though they chased them, they could not catch hold of them. Though the accused tried to run away from the place, he stopped him and he took MO1 kannas from him and examined the contents of the kannas which contained 3 liters of some liquid, which on further

examination, he was satisfied that it was arrack. He took sample, sealed and labeled the sample bottle and also sealed and labeled the kannas in the same fashion and seized MO1 kannas, MO2 glass and the sample bottle as per Ext.P3 mahazar. He arrested the accused and registered the case and then conducted the investigation also.

11. PWs 3 and 4 also corroborated the evidence of PW1 on this aspect. Though they were cross examined at length, nothing was brought out to discredit their evidence on this aspect. DW1 was examined on the side of the accused to prove that he was the Secretary of Taxi Drivers Union of Congress Party of Konni Block Committee and accused was a member of that union. During 2001, Konni police had taken the accused into custody from Konni junction at about 10.00 a.m., the reason for the same was that, while he was taking reverse of his vehicle, that collided with the police jeep came there and PW5, the then Sub Inspector of Konni police station caught hold of him and beaten him. When he along with others reached there,

he was taken to police station in the jeep. The drivers of the union went to the police station and talked to the Sub Inspector of Police. Though he agreed to release him, he did not do so. Along with their president Adv. Sri.Haridas, they again came to the police station and when he interfered, he declared that there was an abkari case in which accused could not be traced out and he will implicate him in that case. It may be mentioned here that, though he had a case, a complaint was filed and protest meeting was failed, excepted the interested testimony there is no other evidence adduced on his side. Further he was not sure about the date on which the accused was taken into custody, according to him it was in 2001, but according to the accused when he was examined under Section 313 Cr.P.C., his case was that, he was taken into custody by the police on 15.04.2002, whereas the incident in this case was on 04.11.2011. So his evidence is not helpful to prove the case of the accused. At the most it can only be presumed that, he came to the court to give evidence to help the

accused and nothing more.

12. DW2 was the watchman of the estate from where the incident happened. According to him on 04.11.2011 during evening police had not come there and no incident happened. But it was admitted by him that, that estate was having an extent of 216 acres. So under the circumstances it is not possible for him to ascertain all the things happened in some portion of the estate. So the court below was perfectly justified in coming to the conclusion that the evidence of DW1 and DW2 is also not helpful to prove the case of the accused. So under the circumstances the court below was perfectly justified in coming to the conclusion relying on the evidence of official witnesses PWs 3 to 5 that the prosecution has proved the case beyond reasonable doubt that the accused was arrested with kannas containing three liters of liquor said to be arrack.

13. Mere seizure of the kannas containing some liquor alone is not sufficient to convict the accused. Unless it is proved by the prosecution that the alleged articles

reached the court without delay and the same articles were produced in a tamper proof condition and the chemical analysis report relates to the representative sample said to have been taken from the articles seized from the possession of the accused, it cannot be said that the prosecution has succeeded in bringing home the guilt of the accused beyond reasonable doubt to convict him for the offence alleged. In this case, the nature of seal used for sealing the article was not mentioned in Ext.P3 mahazar. PWs 3 and 4, the police constables who accompanied PW5 were also not in a position to say the nature of seal said to have been used for sealing the sample and the kannas. They had given inconsistent statement regarding the same. Further even PW5/detecting officer was also not in a position to say the nature of seal used, except stating that, it was a metal seal. According to him there was some letters in the seal, but when the seal found on MO1 kannas was shown, it was found that there was no letters seen on the seal affixed on the kannas. He was also not sure about the

nature of letters in the seal which was used for sealing the article. He had also admitted that he did not take the specimen seal impression of the seal and produced the same in court.

14. Though the detection and the crime was registered on 04.11.2011 itself, the property list of Ext.P7 was prepared only on 05.11.2011 and it was produced before the court on 05.11.2011. The forwarding note was not seen marked in this case. Though in Ext.P1 it was mentioned that there was a label affixed containing the signature of the witnesses, PW5 and the accused, the property list does not show that it was labeled and it was mentioned that it was only sealed. It is true that in Ext.P7 property list, in item 2, namely the sample bottle, it was not mentioned that, the bottle containing arrack, but that alone is not sufficient to discredit the prosecution case as that could only be a mistake. But in view of the discussions made above, it cannot be said that the articles reached the court in a tamper proof condition.

15. It is true that investigation and detection was done by the same person. It is only advisable that a superior officer or another police officer conducting the investigation. But in the case of an abkari offence, only an authorized officer empowered by notification, who is having jurisdiction over the area alone, can conduct the investigation. In such cases, except the Sub Inspector of police, no other officer of that rank who were designated as Abkari Officer will be available for investigation. It is not possible for the higher officials always to conduct the investigation of such cases. Unless prejudice has been established by the accused, the fact that investigation was conducted by the same officer alone is not sufficient to disbelieve the case of the prosecution and that cannot be taken as a ground for acquittal of the accused as well. In this case, no such prejudice has been established. Further court below as well as this court has found that, the evidence adduced on the side of the accused regarding false implication due to some altercation occurred between the

accused and PW5 was found to be false and their evidence was disbelieved on this aspect.

16. On the other hand, non-mentioning of the nature of seal used and the discrepancy of the evidence of PWs 3 to 5 regarding the nature of seal used, that will have some impact on the genuineness of the articles produced before the court. The specimen seal impression is affixed in the seizure mahazar and the specimen seal impression is provided along with property list or in the forwarding note to the court, so as to give an opportunity to the court to verify and satisfy that the article reached the court in tamper proof condition. In this case, the evidence will go to show that there is discrepancy in the evidence of official witnesses regarding the nature of seal used and the property list was not prepared on the same day of detection, though the crime was registered on that day, but it was prepared only on the next day and these things will go to show that, the prosecution has not proved the case beyond reasonable doubt that the articles have reached the court in

the same condition in which it was seized in a tamper proof condition and the chemical analysis report relates to the representative sample said to have been taken from the contraband article alleged to have been seized from the possession of the accused, so as to connect the accused with the contraband articles seized. If this link has not been established, then it cannot be said that prosecution has succeeded in bringing home the complexity of the accused in the commission of the crime and that benefit must given to the accused. These aspects were not properly considered by the court below before coming to the conclusion that the prosecution has proved beyond reasonable doubt that the accused was found to be in possession of arrack and consequential conviction entered by the court below against the appellant for the offence punishable under Section 8(1) and (2) of the Abkari Act is unsustainable in law and the same is liable to be set aside. 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 appellant is entitled to get acquittal, the sentence imposed is not proper and the same is also 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 8(1) of the Abkari Act are hereby set aside. The appellant is acquitted of the charge leveled against him giving him the benefit of doubt. He is set at liberty. The bail bond executed by him will stand cancelled. The lower court is directed to refund the fine amount if any remitted by the appellant on making necessary application for that purpose before that court.

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

Sd/-

**K. Ramakrishnan, Judge**

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*P.A. to Judge*