

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. 1791 of 2004 (C)

**AGAINST THE JUDGMENT IN SC 564/2002 of ADDL.DISTRICT COURT (ADHOC)-II,
ALAPPUZHA DATED 07-10-2004**

APPELLANT(S)/ACCUSED::

**YESODHARAN, S/O BHARGAVAN
MELAMTHOPPIL VEEDU, ERIKKAVU MURI, KUMARAPURAM.**

**BY ADVS.SRI.P.G.THAMPI (SR.)
SRI.S.SANAL KUMAR**

RESPONDENT(S)/COMPLAINANT::

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

BY PUBLIC PROSECUTOR SMT SEENA RAMAKRISHNAN

**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.1791 of 2004

Dated this the 11th day of December, 2015

JUDGMENT

Accused in SC 554/00 on the file of the Sessions Court is the appellant herein. The appellant was charge sheeted by the Excise Inspector, Karthikappaly Excise Range in Crime No. 63/99 of Karthikappaly Excise Range under Section 8(1) r/w 8(2) of the Abkari Act.

2. The case of the prosecution in nut shell was that on 11.11.97 at about 7.a.m, the accused was found to be in possession of 1 litre of arrack and found transiting the same along Narakathara-Koothamkaitha road near Ottathengu junction in violation of the provisions of the Abkari Act and there by he had committed the offence punishable under Section 55(a) of the Abkari Act (which ought to be under Section 8(1) r/w 8(2) of the Abkari Act).

3. After investigation final report was filed before the Judicial First Class Magistrate-I, Haripad where it was taken on file as CP 62/2002. After complying with the formalities, the 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, Sessions Court took cognizance of the case as S.C 564/2002 and the same was made over to the Additional Sessions Court, Fast Track-II, 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 was framed (ought to have framed under Section 8(1) read with 8(2) of the Abkari Act) and the same was read over and explained to him and he pleaded not guilty. In order to prove the case of the prosecution PWs1 to 5 were examined as Exts.P1 to 5 and MO I 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 no article was seized from his possession and while he was going to take sand in canoes from the river, the excise

people came there and asked him about the ownership of some arrack found there and when he told that he was not aware of the same, he has been taken into custody and he has been falsely implicated in the case. Since the evidence in the case did not warrant the acquittal under Section 232 of the Code, the accused was called upon to enter on his defence, but no defence evidence was adduced on his side. After considering the evidence on records, the court below found the appellant guilty under Section 55(a) of the Abkari Act (ought to have under Section 8(1) of the Abkari Act) and convicted him there under and sentenced him 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. Set off was 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 before the court below.

5. Heard Sri S Sanal Kumar, Advocate appearing for the appellant and Smt Seena Ramakrishnan, Public Prosecutor appearing for the State.

6. Counsel for the appellant submitted that the evidence of PWs1 and 2 is not sufficient to prove the seizure. Further, only one of the independent witness to the seizure was examined and the evidence will go to show that the presence of other man is doubtful. Under such circumstances it is no safe to rely on the evidence of the Excise Officials alone to convict the accused. Further, the court below had not properly appreciated the defence taken by the accused which is also probable under the circumstances of the case. The learned counsel also argued that if for any reason, this Court is not inclined to interfere with the conviction, prayed for leniency in respect of sentence.

7. On the other hand, the learned Public Prosecutor submitted that the evidence adduced on the side of the prosecution proved guilt of the accused beyond reasonable doubt. The accused as well as articles

were produced before the court on same day without delay. The specimen seal impression is also produced in the forwarding note. So, according to the learned Public Prosecutor, the court below was perfectly justified in convicting the appellant for the offence alleged and the sentence also cannot be said to be harsh.

8. The case of the prosecution as emerged from the prosecution witnesses was as follows:- On 11.1.1999 at about 7 a.m, while PW1, the Preventive Officer attached to Karthikappally Excise Range was doing Patrol duty along with PW2, the Excise Guard and others and when they reached the junction called Ottathengu junction, they saw the accused coming with MO1 cannass in his hands and on seeing excise party, he tried to go away from that place in a perplex state. So he stopped him and examined the contents of MO I cannass and found that it was having a capacity of 2 ½ litres with 1 litre of some liquid in it. On further examination of the liquid, he was satisfied that it was arrack which he convinced the witnesses and the officials who

accompanied him as well. Thereafter he had taken sample from the liquid and sealed the same and affixed label containing the signature of himself and the witnesses and the accused and sealed and labelled MO I cannass also in the same fashion. He arrested the accused and seized the articles as per Ext.P1 mahazar in the presence of PW3 and CW4 and obtaining the signature of PW3 and CW4 and give intimation to his relatives. Thereafter, he came to Excise Office and entrusted PW3, the Preventive Officer, who was in charge of the Excise Inspector, the accused as well as the contraband articles and the documents prepared. On the basis of the documents produced, PW3 registered Ext.P2 occurrence report as Crime No. 63/99 of Karthikappally Excise Range under Section 8(1) and (2) of the Abkari Act against the accused. He prepared Ext.P3 property list. He produced the articles before court along with Ext.P3 property list. He produced the accused on the same day along with the remand report and the accused was remanded to custody. He sent Ext.P5 forwarding note

with request to send the sample for analysis report. The sample was send from court for analysis and Ext.P4 chemical analysis report obtained which shows that the sample contained 45.64% of ethyl alcohol. The investigation in this case was conducted by PW5, the Excise Inspector. He questioned the witnesses and recorded the statements. He collected Ext.P4 chemical analysis report and completed the investigation and submitted final report.

9. PW3 is the independent witness to seizure. He had admitted his signature in Ext.P1 mahazar and also the arrest memo prepared by PW1 while arresting the accused. But he had also stated that he knew the accused and CW4, who signed the documents as another witness. According to him, he was not present at that time. But he denied having seen the seizure or arrest of the accused. So it is clear from this evidence that he was trying to help the accused and that was the reason why he was not supporting the case of the prosecution.

10. Then the evidence available to prove the arrest and seizure is that of PW1, Detecting Officer and PW2, Excise Guard, who accompanied him. PW1 had stated that on 11.11.1999 at about 7.a.m he was doing patrol duty along with PW2 and others and when they reached junction, they saw the accused coming with MO 1 cannass in his hand and on seeing the excise party, he got perplexed and try to go away from that place. So he stopped him and examined the contents of the cannass and satisfied that it contained 1 litre arrack. Thereafter, he took sample, sealed and labelled the sample bottle and also sealed and labelled the cannass and seized the same as per Ext.P1 mahazar. He arrested the accused and prepared arrest memo and came to Excise Office along with the accused and contraband article seized and produced the accused and contraband article along with the documents before PW4, the Preventive Officer who was in charge of the Excise Inspector at the relevant time. The evidence of PW1 on these aspects was corroborated by PW2, the Excise Guard. Though they

were examined at length nothing was brought to discredit their evidence on this aspect. They denied the suggestion that the accused was arrested while he was going to take sand from the river since he did not mention the name of the person to whom the arrack which was seized from there belonged when asked by the Excise Officials and he has been falsely implicated the case. Though such stand was taken by the accused no evidence was adduced on his side to prove this fact. Mere suggestion alone is not sufficient to prove false implication and that has to be established by the accused by cogent evidence.

11. It is settled law that merely because the independent witnesses to seizure turned hostile is not ground for disbelieving the seizure and court can rely on the official witnesses for this purpose if the court is satisfied with their evidence. In this case there is nothing brought out disbelieve the evidence of Pws 1 and 2 on this aspect. So the court below has perfectly justified in coming to the conclusion that the prosecution has proved beyond reasonable doubt that the accused was arrested

along with MO I cannass with 1 litre liquid said to be arrack.

12. It is seen from the evidence of PW4, that on the basis of the documents produced before him, he registered the crime and produced the accused and the contraband articles before court on the same day. It is seen from Ext.P5 forwarding note that the specimen seal impression of the seal used for sealing the article was provided and Ext.P4 chemical analysis report shows that the seal seen on the bottle was intact and it is tallied with the specimen seal impression provided. From evidence, it is clear that the article was produced before court without delay and there is no possibility of tampering and the court below relying on those evidence rightly came to the conclusion that the prosecution has proved beyond reasonable doubt that the accused was found to be in possession of 1 litre of arrack. which is punishable under Section 8(1) of the Abkari Act, after the amendment though conviction was entered by the court below under Section 55(a) of Abkari Act and convicted him for the said

offence. So the conviction does not called for any interference.

13. As regards the sentence is concerned, court below had sentenced him to undergo Rigorous Imprisonment for one year and also to pay a fine of Rs.1,00,000/- in default to undergo Simple Imprisonment for three months. Set off was allowed for a period of detention already undergone under Section 428 of the Code.

14. Persons who were committing offences under this Act were doing the same and knowing that they were committing the offence and ignoring the consequence of act on innocent people who were consuming such arrack which is being illegally manufactured and prohibited under law. Showing undue leniency in such cases will only give a wrong signal to the society and that may even cause loss of confidence to the people in the criminal justice delivery system itself. But at the same time court can consider the quantity seized, the antecedent of the accused and also possibility of the information of the

accused etc as mitigating circumstances to show leniency in awarding the sentence. In this case, quantity seized is only 1 litre. He was aged 32 years at the time when the offence was committed. It cannot be said that there is no possibility under reformation. So considering the circumstances, this Court feel that retaining the fine amount and default sentence imposed for non payment of fine and reducing the substantiate sentence to six months will be sufficient and that will meets the ends of justice. So the substantive sentence is set aside and the same is modified as follows.

The appellant is sentenced to undergo Rigorous Imprisonment for six months and also to pay a fine of Rs.1,00,000/- in default to undergo Simple Imprisonment for three months. Set off is allowed on a period of detention already undergone.

In the result, appeal is allowed in part. The order of conviction though under Section 55(a) of Abkari Act (which should be Section 8(1) of the Abkari Act) and sentence of fine of Rs.1,00,000/- with default sentence of

three months Simple Imprisonment are hereby confirmed. The substantive sentence of one year Rigorous Imprisonment is set aside. The same is modified as follows.

The appellant is sentenced to undergo Rigorous Imprisonment for six months and also to pay a fine of Rs.1,00,000/- in default to undergo Simple Imprisonment for three months. Set off is allowed on a period of detention already undergone under Section 428 of the Code.

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

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

True Copy

P.A to Judge

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