

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

THURSDAY, THE 10TH DAY OF DECEMBER 2015/19TH AGRAHAYANA, 1937

CRL.A.No. 1813 of 2004 ()

SC 225/2003 OF ADDL.DISTRICT AND SESSIONS COURT FAST TRACK
(ADHOC-I), KOZHIKODE

APPELLANT(S)/ACCUSED::

LOHITHAKSHAN @ GOPI, AGED 49 YEARS
S/O RARCHAN,
VATTAPOYIL VEETIL HOUSE, KEDAVOOR
AMSOM CHAMAL DESOM, KOZHIKODE.

BY ADV. SRI.SUNNY MATHEW

RESPONDENT(S)/COMPLAINANT::

STATE OF KERALA
EXCISE INSPECTOR, THAMARASSERY, REP. BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

R1 BY. PUBLIC PROSECUTOR SHRI. JIBU P. THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 10-12-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SKV

K.RAMAKRISHNAN, J.

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Crl. Appeal No.1813 OF 2004

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Dated this the 10th day of December, 2015

JUDGMENT

Accused in SC 225/2003 on the file of the Additional Sessions Court (Fast Track-I) Kozhikode is the appellant herein. The appellant was charge sheeted by the Excise Inspector, Thamarassery in Crime No.12/2000 of that Excise Range under Section 55(a) of the Abkari Act (ought to be under Section 8(1) of Abkari Act).

2. The case of the prosecution in nutshell was that on 7.7.2000, at about 9 am, the accused was found to be in possession of 1½ litres of arrack in 2½ litres plastic can and found transitting the same along the road near the shop of one Sekharan in Kedavoor Amsom Chamal Desom in Kelam Moola junction in violation of the provisions of the Abkari Act and thereby he had committed the offence punishable under Sections 55(a) of the Abkari Act (ought to be under Section 8(1) of the Act).

3. After investigation, final report was filed before

the Judicial First Class Magistrate's Court-I Thamarassery and learned Magistrate, after complying with the formalities, committed the case to the Sessions Court, Kozhikode under Section 209 of Code of Criminal Procedure (hereinafter referred to as the Code). After committal, the case was taken on file as SC 225/2003 on the file of the Sessions Court, Kozhikode and thereafter it was made over to Third Additional Assistant Sessions Court, Kozhikode for disposal.

4. When the case was pending before that court the accused appeared and after hearing both sides, charge under Section 55(a) of the Abkari was framed and same was read over and explained to him and he pleaded not guilty. Thereafter the case withdrawn by the Sessions Court and made over to Additional Sessions Court (Adhoc-I) Kozhikode for disposal.

5. In order to prove the case of prosecution, PWs 1 to 4 were examined and Exts.P1 to P5 and MO1 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 he was taken by the excise officials and falsely implicated in the case. Since the evidence in this case did not warrant an 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 record, the court below found the appellant guilty under Section 55(a) of the Abkari Act and convicted him thereunder 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 simple imprisonment for six months. Set off was allowed for the period detention already undergone by him under Section 428 of the Code. Aggrieved by the same, the present appeal has been preferred by the appellant/accused before the court

below.

6. Heard Shri. Sunny Mathew counsel appearing for the appellant and Shri. Jibu P. Thomas learned Public Prosecutor appearing for the State.

7. The counsel for the appellant argued that the specimen seal impression of the seal used for sealing the article has not been produced. Further the nature of seal used was not mentioned in Ext.P1 mahazar as well. Further forwarding note was either produced or marked in this case so as to ascertain as to whether the specimen seal impression was provided so as to verify the genuineness of the sample produced by the court and chemical examiner so as to come to the conclusion that 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. He had relied on the decision reported **Sasidharan v State of Kerala** [2007 (1) KLT 720] in support of the case.

8. On the other hand, the learned Public Prosecutor submitted that there was no delay in producing the article and the articles were produced on the same day of seizure and there is no possibility of tampering and it was sent from court and so the court below was perfectly justified in convicting the appellant for the offence alleged.

9. The case of the prosecution as emerged from the prosecution witnesses was as follows:

On 7.7.2000, at about 9 am, while PW1 the preventive officer attached to Thamarassery excise range was doing patrol duty along with PW2 and when they reached the place near the shop of one Sekharan at Kelam Moola junction, they saw the accused standing there with MO1 kannas in his hand. On seeing the excise party, he got perplexed and tried to go away from that place. So he stopped him and verified the contents of the kannas and found that it was having a capacity of 2 ½ litres of with 1 ½ litres of some liquid in it which on

further examination he was satisfied that it was arrack. He took sample of 180 ml from the liquid and sealed the same and affixed label showing the particulars of the case and sealed the kannas and labelled the same also in the same fashion and seized the same as per Ext.P2 mahazar in the presence of PW2 and another. He arrested the accused and prepared Ext.P1 arrest memo and came to the office along with the accused and the contraband article and registered Ext.P3 crime and occurrence report as Crime No.12/2000 of Thamarassery Excise Range under Section 55(a) of the Abkari Act (ought to be under Section 8(1) of the Act). He produced the accused along with remand report before court. He prepared Ext.P4 property list and produced the articles before the court. The sample was sent from court and Ext.P5 chemical analysis report obtained. The investigation in this case was conducted by PW4, who questioned the witnesses and recorded their statements. He collected Ext.P5 chemical analysis report and produced the same before

court and completed investigation and submitted final report.

10. PW3 is the independent witness to seizure, but he did not support the case of the prosecution. He denied having seen the seizure or arrest of the accused, though he admitted his signature in Ext.P2 mahazar. So it is clear from this that he was trying to help the accused and that was the reason why he was not supporting the case of the prosecution.

11. Then the evidence available is that of PWs1 and 2 the detecting officer and the excise official who accompanied him. PW1 had deposed that on 7.7.2000, at about 9 am, while they were doing patrol duty and when they reached the place near the shop at one Sekharan at Kelam Moola junction, they saw the accused standing with MO1 cannas in his hand and on seeing excise party, he got perplexed. So he stopped him and examined the contents of cannas and found that it is having 1 ½ litres of arrack which he satisfied by smelling and tasting.

Thereafter he took the sample and sealed the kannas and sample bottle and labelled the same and seized the same as per Ext.P2 mahazar in the presence of PW3 and another. He arrested the accused and came to the excise office and registered the crime. The evidence of PW1 on these aspects were corroborated by the evidence of PW2. Though they were cross examined at length, nothing was brought out discredit their evidence on these aspects. So under the circumstances, it can be safely concluded that prosecution has proved that accused was arrested by PW1 along with a kannas said to be contained arrack.

12. Mere seizure of kannas with some liquid said to be arrack alone is not sufficient to convict the accused for the offence alleged. It must be proved by the prosecution that sample reached the court and the chemical examiners' lab in tamper proof condition and the report relates to representative sample said to have been taken from the contraband articles alleged to have been seized from the possession of the accused. In this case though

the articles were produced before court on the same day, the specimen seal impression of the seal used for sealing the articles was not produced. In Ext.P2 also the nature of seal used was not mentioned, though it was stated by PW1 in his evidence that his personal seal was used. The forwarding note was not seen produced or marked in the case. Though this court has called for the entire records including the unmarked documents, the court below send a reply stating that all the available documents were already sent to this Court and no documents were with them. So it is clear from the records that forwarding note was not available either for marking by the court below or for even perusal by this court. Further PW1 also did not mention in his evidence that he had prepared the forwarding note and sent the same to the court as well. He had only stated that Ext.P5 is the chemical analysis report obtained regarding the sample. But that alone is not sufficient to come to the conclusion that the same sample has been reached the court and chemical analysis

lab so as to infer that chemical analysis report relates to that sample.

13. The forwarding note with the specimen seal impression of the seal used for sealing the article is produced in court and also a copy of the same is sent to chemical examiners' lab so as to satisfy the court as well as chemical examiner that the sample said to have been taken from the contraband articles had reached them in a tamper proof condition. Merely because in Ext.P2 it was mentioned that the specimen seal impression tallied with the impression of the seal seen on the bottle alone is not sufficient to prove that it reached the court in a tamper proof condition.

14. What is the nature of seal that has been provided for comparison is not clear from the evidence in this case. Further there is no mention made by either PW1 or the investigating office that any request has to be made to the court for sending the sample for analysis and it was on that basis Ext.P5 report was obtained. In the

absence of such evidence, it cannot be said that prosecution was able to establish that the chemical analysis report relates to the representative sample said to have been taken from the contraband article and that benefit must be given to the accused. This was so held in the decision reported in **Sasidharan v State of Kerala** [2007 (1) KLT 720] and **Krishnan v State** [2015 (1) KHC 822]. These aspects were not considered by the court below before coming to the conclusion that prosecution has proved the case against the accused beyond reasonable doubt and consequential conviction entered by the court below 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.

15. In view of the finding that the appellant is entitled to get acquittal, the sentence imposed is also 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 55 (a) of the Abkari Act (ought to be under Section 8(1) of the Abkari Act) 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 will stand cancelled. The lower court is directed to refund the fine amount if any remitted by the appellant to him on making necessary application for this purpose.

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

K.RAMAKRISHNAN, JUDGE

SKV