

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

THURSDAY, THE 1ST DAY OF OCTOBER 2015/9TH ASWINA, 1937

CRL.A.No. 1470 of 2005 ()

AGAINST THE JUDGMENT IN SC 432/2004 of ADDITIONAL DISTRICT COURT
(ADHOC-I), PALAKKAD DATED 02-08-2005
APPELLANT/ACCUSED.:

KANNAPPAN, S/O.SUNDARAN, KOTTILPARADESOM
ELAPPULLY PANCHAYATH, CHITTUR TALUK
PALAKKAD DISTRICT.

BY ADV. SRI.C.C.THOMAS (SR.)
BY ADV.SRI.PRAJEESH N.P

RESPONDENT/COMPLAINANT.:

STATE OF KERALA, REPRESENTED BY EXCISE
INSPECTOR, EXCISE RANGE OFFICE, CHITTUR
PALAKKAD, DISTRICT BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.JIBU P.THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 01-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. RAMAKRISHNAN, J.

.....
Crl.A.No.1470 of 2005
.....

Dated this the 1st day of October, 2015.

JUDGMENT

The accused in S.C.No.432/2004 on the file of the Additional Sessions Court, Adhoc-I, Palakkad is the appellant herein. The appellant was charge sheeted by the Excise Inspector, Chittur Excise Range in Crime No.43/2000 of that excise range under section 55(a) of the Abkari Act.

2. The case of the prosecution in nutshell was that on 26.8.2000 at about 1.15 p.m the accused was found to be in possession of 15 litres of coconut toddy in a pot in his possession and transiting the same through a lane on the western side of Elippara market in Vadakarapathy panchayat in Chittur taluk in violation of the provisions of the Abkari Act and thereby he had committed the offence punishable under section 55(a) of the Abkari Act.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court-II, Palakkad where it was taken on file as C.P.No.23/2004. After completing the formalities, learned Magistrate committed the case to Sessions

Court, Palakkad under section 209 of the Code of Criminal Procedure (herein after referred to as 'the Code'). After committal, the case was taken on file as SC.No.432/2004 by the Sessions Court and originally it was made over to the Assistant Sessions Court, Palakkad for disposal and thereafter it was withdrawn by the Sessions Judge and made over to the Additional Sessions Court, Fast Track-I, Palakkad for disposal.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 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 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 he had not committed any offence and he 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 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 simple imprisonment for six months and also to pay a fine of Rs. One lakh, in default to undergo simple imprisonment for three 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.

5. Heard Sri.Prajeesh N.P, counsel representing senior counsel Sri.C.C. Thomas, appearing for the appellant and Sri. Jibu P. Thomas, Public Prosecutor appearing for the State.

6. Counsel for the appellant submitted that the article seized was coconut toddy and there is no case for the prosecution that it is an illegally transported toddy. The only allegation was that he was in possession of excess quantity without any permit and that will not fall under section 55 (a), but only fall under section 63 of the Abkari Act. He also argued

that specimen seal was not provided and there is no evidence to show that the same sample had reached before court and the chemical analysis report relates to the representative sample taken from the contraband article alleged to have been seized from the possession of the accused. So according to him, the prosecution has failed to prove the case against him. He had relied on the decision reported in ***Mohanan v. State of Kerala*** (2007 (1) KLT 845) in support of his case.

7. On the other hand, Public Prosecutor submitted that evidence adduced on the side of the prosecution proved the case against the accused beyond reasonable doubt 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 26.8.2000 at about 1.15 p.m while PW1 the Excise Inspector along with PW2, the Preventive Officer were doing patrol duty and when they reached the place of occurrence, they saw the accused coming with a pot on his shoulder and on seeing the excise party, he got perplexed and tried to run

away from the place and they stopped him and on examination of the contents of the pot, they were satisfied that it was having 5 litres and it was coconut toddy. He had taken 500 ml as sample and added Benzoic acid and thereafter sealed the bottle containing signature of himself, accused and also affixed label on the pot. He seized the same as per Ext.P1 mahazer in the presence of Pws 3 and 4. Thereafter he arrested the accused as per Ext.P2 arrest memo and came to excise office and registered Ext.P3 crime and occurrence report as Crime No.43/2000 of Chittur Excise Range under section 55 (a) of the Abkri Act against the accused. He produced the accused along with the contraband article before court on the same day and also furnished forwarding note with a request to send the sample for analysis. It was sent from court and Ext.P5 report obtained which shows that sample contained 5.34% by volume of ethyl alcohol which is less than the permissible limit. He completed the investigation and submitted final report.

9. Pws 3 and 4 are independent witnesses to the seizure. They admitted the signature in Ext.P1 but denied having seen

the seizure or arrest of the accused. Then the evidence is only that of Pws 1 and 2, who are the official witnesses. PW1 had categorically stated that on that day, he was doing patrol duty and when he reached the place, he saw the accused coming with MO1 pot on his shoulder and on seeing the excise party, he tried to escape from the place. So he stopped him and on examination of the pot, he was satisfied that it was coconut toddy and he took sample, sealed the same and labelled the same and labelled the pot and seized the same as per Ext.P1 mahazer. The evidence of PW1 was corroborated by PW2, the Preventive Officer as well. So court below relying on the decision reported in ***Tahir v. State (Delhi)*** (AIR 1996 SC 3079) and ***Karamjitj Singh v. State (Delhi Admn.)*** (AIR 2003 SC 1311) came to a conclusion that though independent witnesses turned hostile, nothing wrong for the court to rely on the official witnesses if their evidence is trustworthy and believable and relied on their evidence and come to the conclusion that prosecution has proved the arrest of the accused along with some liquid having 15 litres carried in MO1 pot.

10. It is true that in MO1, the label said to have been affixed is not seen. It may be mentioned here that seizure was effected on 26.8.2000 and the evidence was taken in the year 2005. So possibility of damage being caused to label cannot be ruled out and on that ground it cannot be said that the article produced is not the same article. Further it is seen from the evidence of PW1 that the entire documents including the materials objects were produced before court on the same day and the forwarding note contains the specimen seal which has been used for sealing the sample and Ext.P5 report shows that the seal is found in tact. So it can be safely be concluded that the prosecution has proved that the contraband article has been produced before court in a tamper proof condition and the chemical analysis report relates to that article and it was toddy that has been seized from the possession of the accused.

11. The prosecution has no case that the toddy seized is an illegally transported or illegally obtained toddy. It is also not the case of the prosecution that it was illegally manufactured toddy as well. So the only allegation was that he was in

possession of excess quantity of toddy without any permit or licence. As per the law existing at that time, a person can possess only 2.5 litres of toddy without any document. In the decision reported in ***Mohanan's case*** (cited supra), a Division Bench of this Court has observed that unless it is proved by the prosecution that it is illegally imported or exported toddy or illegally manufactured toddy, one cannot be found guilty under section 55(a) of the Abkari Act. Mere possession of licit toddy even if it is excess quantity, may come under section 63 of the Abkari Act. The decision relied on by the court below ***George Isac v. State of Kerala*** (2004 (1) KLT 752) was overruled in this decision. So under the circumstances the court below was not justified in convicting the appellant for the offence under section 55(a) of the Abkari Act merely on the ground that he is in possession of excess quantity of licit toddy and that finding is liable to be set aside and he is entitled to get acquittal of that charge. But since he was not in having any document for possession of excess quantity, he is liable to be convicted for the offence under section 63 of the Abkari Act and so the accused is liable to be convicted for the offence under section

63 of the Abkari Act and conviction is converted under section 63 of the Abkari Act.

12. Since this Court has found that conviction under section 55(a) of the Abkari Act is not proper, but he is convicted under section 63 of the Abkari Act, the sentence imposed is not proper and the same is liable to be set aside. This Court feels that considering the fact that it is toddy and not illicit toddy, imposing fine alone is sufficient. So sentencing the appellant to pay a fine of Rs.5,000/- will be sufficient and that will meet the ends of justice. So he is sentenced to pay a fine of Rs.5000/- in default, to undergo simple imprisonment for one month.

13. So the appeal is allowed in part. The order of conviction and sentence passed by the court below against the appellant under section 55 (a) of the Abkari Act are set aside and he is acquitted of that charge but he is found guilty under section 63 of the Act and convicted thereunder and sentenced to pay a fine of Rs.5,000/- in default, to undergo simple imprisonment for one month. If any excess amount has been remitted, the court below is directed to refund the same to the

appellant on making necessary application in that regard.

With the above modification of the conviction and sentence passed by the court below, the appeal is allowed in part and disposed of accordingly.

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

Sd/-

K. RAMAKRISHNAN, JUDGE.

/true copy/

P.S to Judge

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