IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 12TH DAY OF OCTOBER 2015/20TH ASWINA, 1937

CRL.A.No. 1493 of 2005 ( )

SC 381/2003 of ADDL.DISTRICT COURT (FAST TRACK -I), ALAPPUZHA

APPELLANT(S)/ACCUSED:

DASAN, S/O. MADHAVAN,
THOTTUMKALVELI VEEDU, KANJIKUZHY PANCHAYATH, WARD NO.IV
CHERTHALA TALUK.

BY ADVS.SRI.ASP.KURUP
SRI.SADCHITH.P.KURUP
ADV.S.K.BALA CHANDRAN(LEGAL AID COUNSSEL)
ADV.S.K.BALA CHANDRAN(LEGAL AID COUNSSEL)

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

R1 BY PUBLIC PROSECUTOR SMT. SEENA RAMAKRISHNAN

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

SKV

K.RAMAKRISHNAN, J.

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Crl. Appeal No.1493 OF 2005

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Dated this the 12th day of October, 2015

JUDGMENT

The accused in SC No.38/2003 on the file of the Additional Sessions Court (Fast Track-1) Alappuzha is the appellant herein. The appellant was charge sheeted by the Excise Inspector, Kuttanad Excise Range under Section 8(1) and (2) and 55 (a) of the Abkari Act in Crime No.35/1998 of that Excise Range.

2. The case of the prosecution in nut shell was that on 10.11.1998 at about 2 pm the accused was found to be in possession of 2.5 litres of arrack on the side of the retaining wall on the old church situated on the southern side of the Chithirakkayal in a paper packet for the purpose of sale in violation of the provisions of the Abkari Act and thereby he had committed the offence punishable under Section 8(1) and (2) of the Abkari Act.

3. After investigation, final report was filed before the Judicial First Class Magistrate's Court, Ramankary where

it was taken on file as CP 4/2003. Thereafter the learned Magistrate committed the case to Sessions Court, Alappuzha where it was taken on file as SC 381/2003 and originally made over to Principal Assistant Sessions Court, Alappuzha.

4. When the case was pending before that court, the accused appeared before that court and the learned Principle Assistant Sessions Judge, Alappuzha, after hearing both sides, framed charge under Section 8(1) and (2) and 55(a) of the Abkari Act and the same was read over and explained to him and he pleaded not guilty. Thereafter the Sessions Judge, Alappuzha withdrew the case from that court and made over to Additional Sessions Court (Adhoc-1) Alappuzha for disposal.

5. In order to prove the case of the prosecution, PWs1to 7 were examined and Exts.P1 to P4 and MO1 and MO2 were marked on their side. After closure of the prosecution evidence, the accused was questioned under

Section 313 of the Code of Criminal Procedure (hereinafter referred to as the Code) and he denied all the incriminating circumstances brought against him in the prosecution evidence. He had further stated that no incriminating articles were seized from his possession. When the Excise officials came, he did not get up and they asked whether he had seen them and he told that he did not see them. So he was taken in a boat and made to sign certain papers and then 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. DW1 was examined on the side of the accused to prove his case. After considering the evidence on record, the court below found the appellant was found not guilty for the offence under Section 8(1) and (2) of the Abkari Act and acquitted him of that charge under Section 235(I) of the Code. But the court below found him guilty under Section 8 (1) and 8(2) of the Abkari Act and convicted thereunder and sentenced him to undergo rigorous imprisonment for 2 years and also to pay a fine of Rs.1,00,000/- in default to undergo simple imprisonment for 6 months. Set off was allowed for the period of detention already undergone by him 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 Sri. Sadchith P. Kurup, counsel appearing for the appellant and Smt. Seena Ramakrishnan learned Public Prosecutor appearing for the State.

7. Though earlier due to non representation on behalf of the appellant Sri. S.K. Balachandran Advocate, Ernakulam was appointed as legal aid counsel. Since the counsel for the appellant himself prepared to argue the case, the appointment of legal aid counsel was terminated and the counsel for the appellant was permitted to argue the case.

8. The counsel for the appellant submitted that

though detection was made by Excise inspector of Excise Anti Narcotic Squad, the Crime and occurrence report was registered by Assistant Excise Inspector, who is not an Abkari Officer and it was he who had produced the articles before the court, that is not proper. Further though the detection was made on 10.11.1998 the articles were produced before the court only on 12.11.1998. But according to PW5, the Assistant Excise Inspector the articles were produced along with accused on 11.11.1998, but no such endorsement was seen on the property list. It can only be presumed that in the absence of evidence it was produced on 12.11.1998 and the delay has not been explained. Further the nature of seal affixed was not mentioned in the seizure mahazar. The forwarding note was not marked as well. So under the circumstances, the court below was not justified in coming to the conclusion that the prosecution has proved the case beyond reasonable doubt and the conviction entered by the court below is not sustainable in law and the appellant is entitled to acquittal .

9. On the other hand the learned Public Prosecutor submitted that PW5 had categorically stated that he was in in possession of the contraband articles till it was produced in court. Delay has been explained. Further no question was put to any of the witnesses regrading the nature of sampling made etc. According to the learned Public Prosecutor, the conviction entered is just and proper.

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

On 10.11.1998, at about 2.pm, while PW3 the Excise Inspector attached to Excise Enforcement and Anti Narcotic Squad, Alappuzha along with PW4 and party was doing patrol duty and when they reached near the old Church in Kynagari North Village, they found the accused sitting in the compound wall and on seeing the Excise party he tried to go away from that place. So they stopped him and on examination of the contents of MO1 bottle, they found that it contained 2½ litres of some liquid and on further examination, they were satisfied that it was arrack. So they arrested the accused and took sample from the liquid seen in MO1 bottle, which was covered in MO2 newspaper and sealed the same and affixed the label containing the signatures of accused, himself and witnesses and he sealed the bottle and the newspaper also in the same fashion and affixed label on them. Thereafter he came to Kuttanad Excise Range and produced the accused along with contraband articles with the documents prepared before the Assistant Excise Inspector viz, PW5, who was in charge of the Excise Inspector at that time, on the basis of the documents produced, PW5 registered Ext.P2 crime and occurrence report against the accused under Section 8(1) and 8(2) and 58 of the Abkari Act and he prepared Ext.P3 property list and produced the accused along with remand report and produced the articles before the court along with

Ext.P3 thondi list. The earlier part of the investigation was conducted by PW6 the Excise inspector who questioned the witnesses and recorded the statement. Further investigation is conducted by PW7 on the basis of forwarding note sent by PW5. The sample was sent from court and Ext.P4 chemical analysis report obtained which shows that sample contained 19.07% by volume of ethyl alcohol. PW6 collected the chemical analysis report and completed investigation and submitted final report before the court.

11. PWs1 and 2 were the alleged independent witnesses to seizure. Though they admitted their signatures in Ext.P1, they denied having seen the arrest or seizure. So it is clear from their evidence that they were now trying to help the accused and that was the reason why they were not supporting the case of the prosecution. Then the evidence was that of PWs3 and 4, the detecting officer and officer who accompanied him. PW3 had stated that he

was working as Excise Inspector in Excise Anti Narcotic Squad, Alappuzha and on 10.11.1998, at about 2.00 pm, he was doing patrol duty along with PW4 and others and when they reached the place of occurrence, they saw the accused sitting in the compound wall of the old Church abetting the Chithirakkayal and on seeing the excise party, he tried to go away from that place. So they stopped him and took MO1 bottle which was covered in MO2 and on verification of the bottle they were satisfied that it was having 2½ litres of some liquid which on further examination by smelling and tasting, he was satisfied that it was arrack. Thereafter he arrested the accused and took sample from the contents in MO1 bottle and sealed the same and affixed label containing the signatures of himself, witnesses and accused. He had sealed MO1 bottle as well as MO2 paper in the same manner and labelled the same also in the same manner and seized the same as per Ext.P1 mahazar and thereafter he came to Excise office and produced the contraband articles and accused along with the documents before PW5 the Assistant Excise Inspector. The evidence of PW3 was corroborated by the evidence of PW4. Though they were cross examined at length, nothing was brought out to discredit their evidence on this aspect. They denied the suggestion that he has been falsely implicated in the case.

12. DW1 was examined on the side of the accused to prove that since there was some altercation occurred between the Excise official and the accused, he has been taken from near Chithirakkayal. But he had admitted that he did not make any enquiry regarding the same and no complaint was filed also. Further it is seen from the record that no complaint of any false implication was made by the accused when he was produced before the Magistrate. So under the circumstances, court below was perfectly justified in rejecting the evidence of DW and believing the evidence of PWs3 and 4 and came to the conclusion that the

prosecution has proved beyond reasonable doubt that the accused was arrested along with MO1 bottle, covered in MO2 paper on that day.

13. It is seen from the evidence of PW5 that he was working as Assistant Excise Inspector and he was in charge of the Excise office at that time. So when he was in charge of the Excise inspector in the office, then he will get all the powers of the Excise inspector. So there is nothing wrong for Assistant Excise Inspector in exercising the powers of the Excise Inspector when he was in charge of the Excise Inspector and registering the crime and producing the accused and articles before the court and that will not be a ground for acquittal.

14. It is seen from the evidence of PW5 that he had produced the contraband articled seized before the court along with the accused with the property list. It is seen from the records that accused was produced before the Magistrate on 11.11.1998, but the articles alleged to have

been seized were produced before the court only on 12.11.1998 ie, nearly two days of the alleged seizure. Though PW5 had stated that he was in custody of the article till it was produced before the court, according to him, it was produced along with the accused. But the documents produced shows otherwise. So it cannot be said that the articles were produced as claimed by him and the delay in producing the article has not been explained as well. In the decision reported in Ravi v State of Kerala and Another [2011 (3) KHC 121] the Division Bench of this court held that mere delay in producing the article is not a ground for acquittal, if the delay has been explained to the satisfaction of the court. But if the delay is not explained, then that benefit must be given to the accused.

15. In this case, seizure was effected on 10.11.1998 at about 2pm, by Excise Enforcement and Anti Narcotic Special Squad, Alappuzha, but it was produced before the court by PW5 on 12.11.1998 as seen from Ext.P3 property

list. Further the nature of seal used was not mentioned in Ext.P1 seizure mahazar and specimen impression of the seal was also not seen affixed there. Further the forwarding note was also not marked in the case. But on verification of the forwarding note from the court, it is seen that the nature of specimen seal seen on the forwarding note in the place provided for specimen seal of seal used, for sealing the sample it contains specimen impression seal of the court and no specimen impression of the seal used by the detecting officer for sealing the article was provided. So under the circumstances, it cannot be said that the articles reached the court in a tamper free condition and the prosecution has proved a link between the nature of the article seized and the accused, so as to bring home the offence alleged against him and that benefit must be given to the accused. These aspects were not considered by the court below before coming to the conclusion that 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 is also unsustainable in law and the same are liable to be set aside.The appellant is entitled to get acquittal of the charge levelled against him giving him the benefit of doubt.

16. In view of the finding that the appellant is entitled to get acquittal, the sentence imposed by the court below 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) and (2) of the Abkari Act) are set aside and 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 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 that purpose.

Office is directed to communicate this order to High Court Legal Service Committee regarding the termination of legal aid counsel. Office is directed to communicate this order to the concerned court immediately.

Sd/-
K.RAMAKRISHNAN, JUDGE

SKV