

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

FRIDAY, THE 18TH DAY OF DECEMBER 2015/27TH AGRAHAYANA, 1937

CRL.A.No. 1844 of 2004 ()

SC 519/1999 of ADDL. DISTRICT COURT-I (ADHOC), KOLLAM

APPELLANT(S)/ACCUSED:

G.SOMARAJAN
KANDATHIL, ITHOTTUVA, WEST KALLADA VILLAGE.

BY ADVS.SRI.SHABU SREEDHARAN
SRI.P.A.NOOR MUHAMMED

RESPONDENT(S)/COMPLAINANT:

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

R1 BY PUBLIC PROSECUTOR SRI. JIBU P. THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 18-12-
2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SKV

K.RAMAKRISHNAN, J.

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Crl. Appeal No. 1844 OF 2004

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Dated this the 18th day of December, 2015

JUDGMENT

Accused in SC 519/1999 on the file of the Additional Session's Court (Adhoc-I) Kollam is the appellant herein. The appellant was charge sheeted by the Sub Inspector of Police, Sasthamkotta in Crime No.228/1998 of that Police Station under Section 55(a) of the Abkari Act (ought to be under Section 8(1) of the Abkari Act).

2. The case of the prosecution in nutshell was that on 10.7.1998, at about 7.15 pm, the accused was found to be in possession of 2 litres of arrack and found selling the same at Mulaikalkadavu in Aithottuva Muri of West Kallada Village in violation of the provisions of Abkari Act and thereby he had committed the offence punishable under Section 55(a) of the Abkari Act (ought to be under Section 8 (1) of the Abkari Act).

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

where it was taken on file as CP 31/1999. After complying with the formalities, the learned Magistrate committed the case to Session's Court, Kollam under Section 209 of the Code of Criminal Procedure (hereinafter referred to as the Code). After committal, the learned Sessions Judge took cognizance of the case as SC 519/1999 and the same was originally made over to Principal Assistant Sessions Court, Kollam for disposal. Thereafter the case was withdrawn by the Sessions Judge and made over to Additional Sessions Court (Adhoc-I) for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under Section 55(a) and (i) 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, PWs1 to 5 were examined and Exts.P1 to P4 and MOs1 and 2 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 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 not guilty of the offence under Section 55(i) of the Abkari Act and acquitted him of that charge but found him guilty under Section 55(a) 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 Rs.1,00,000/- and in default to undergo simple imprisonment for six 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 present appeal has been preferred by the appellant/accused before the court below.

5. Heard the Counsel for the appellant Shri.Shabu Sreedharan and learned Public Prosecutor Shri. Jibu P.Thomas and perused the records.

6. The counsel for the appellant submitted that there is no acceptable evidence adduced on the side of the prosecution regarding the identity of the accused and the person who ran away from the place and they have no proper acquaintance with the accused and their identification from court is not sufficient to prove this fact. Further there is inordinate delay in producing the article and it cannot be said that the prosecution has proved the case beyond reasonable doubt and he is entitled to get acquittal.

7. In accordance with law, the learned Public Prosecutor submitted that the evidence adduced on the side of the prosecution proved the guilt of the accused beyond reasonable doubt and PWs 3 and 4 have deposed about the seizure and arrest of the accused and PW4 had explained the possession of the article till it was produced in court. So 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 10.7.1998, at about 7.15 pm, according to the

prosecution, while PW4 along with PW3 was doing patrol duty, he got information that one Somarajan was selling arrack from the Padinjarekallada Mulaikalkadavu and on the basis of that information, he immediately went to the spot and found a person standing there with MO1 kannas and MO2 glass. On seeing the police party, he abandoned the articles and jumped into the river and escaped from the place. On inquiry, it was revealed that the person who ran away from the place was the accused. He verified the contents of MO1 kannas and satisfied that it contained two litres of arrack. He took sample and sealed and labelled the same and he had sealed and labelled the kannas also and seized the same as per Ext.P1 mahazar and he came to Police Station and registered Ext.P2 First Information Report as Crime No.228/1998 of Sasthamcotta Police Station under Section 55(a) of the Abkari Act against the accused. He produced the articles before the court along with Ext.P3 property list. On the basis of the requisition given by him, the sample was sent from court and Ext.P4 chemical analysis report obtained which shows that the sample

contained 35.22% by volume of ethyl alcohol. PW4 himself conducted the initial part of the investigation and the investigation conducted by PW4 was verified by PW5 and he submitted final report.

9. PWs1 and 2 were examined to prove the seizure and also the identity of the accused as the person who abandoned the articles and ran away from the place. But both PWs1 and 2 have stated that they did not know the accused and they did not see the accused escaping from there after abandoning MOs 1 and 2. But they have admitted their signatures in Ext.P1 mahazar. So at the most their evidence is helpful only to prove that MOs1 and 2 were seized from that place.

10. Then the evidence available is that of PWs3 and 3. PW4 was the detecting cum investigation officer and PW3 was the accompanying officer. PW4 had deposed that on that day while he was doing patrol duty along with PW3, he got information that one Somarajan was selling arrack from Padinjarekallada, Mulaikalkadavu. According to him, he went to that place and on seeing them, one person who was

holding a kannas and glass, abandoned the same and escaped from there. On verification of the kannas, he was satisfied that it contained two litres of arrack. So he seized the same after taking the sample as per Ext.P1 mahazar. According to PW4, the wife of the accused was present at that time. He ascertained the identity of the person who ran away from the place as the accused from his own wife . It is on that basis he registered the crime. PW3 had corroborated the evidence of PW4 on these aspects. PW4 had no case that he had prior acquaintance with the accused. He had admitted in his examination that neither of the witnesses had deposed before him that they knew the accused and they did not disclose the name of the accused to him as the person who ran away from the place. According to him, he got the identity of the accused from the wife of the accused but she was not made as a witness in this case. He had no case that he had personal acquaintance with the accused prior to the incident. According to him, the police officials have arrested the accused on 15.9.1998 and produced before him. He had no

case even at that time he had identified the accused as a person who escaped from the place and he had no case that he had shown the accused to the witnesses and identified him as the person who abandoned the articles and ran away from the place.

11. Neither in Ext.P1 nor in the report on the basis of which Ext.P2 First Information Report was registered, it was mentioned that on the basis of the prior information that one Somarajan was selling arrack from Padinjarekallada, Mulaikalkadavu, they went to that place. So this aspect was deposed by the witnesses only before the court for the first time. Further though PW3 had stated that the present accused was accused in several Abkari cases and he knew that he is an accused, but in cross examination, he had stated that he had no personal knowledge or acquaintance with the accused. So it is clear from his evidence that he had also no personal acquaintance with the accused so as to identify the person who ran way from the place and he had further admitted that he did not disclose the name of the accused as person who ran away from the place after

abandoning the articles to PW4, the Sub Inspector of Police who detected the crime also. So under the circumstances, in the absence of any acceptable evidence adduced on the side of the prosecution regarding the identity of the accused as person who ran away from the place after abandoning the articles, it is not safe to rely on the evidence of PWs3 and 4 who had no personal acquaintance of the accused at that time to prove his identity so as to convict him for the offence of possession of arrack. So the finding of the court below that prosecution has proved the case against the accused regarding his identity is unsustainable in law and that benefit must be given to the accused.

12. Further though the alleged seizure was on 10.7.1998, it is seen from Ext.P3 property list that it was produced before the court only on 31.8.1998 more than 50 days of alleged seizure. There is no explanation forthcoming from the side of the prosecution for non production of the articles before court with such delay. Further the specimen seal impression of the seal used for sealing the sample was not produced and the nature of seal

used was not mentioned in Ext.P1 mahazar as well.

13. In the decision reported in Ravi v State of Kerala and Another [2011 (3) KHC 121], the Division Bench of this Court has held that mere delay in producing the articles alone is not sufficient to doubt the genuineness of the articles produced, if the delay has been properly explained to the satisfaction of the court. If the delay has not been explained, then that benefit must be given to the accused. In this case, the delay has not been explained. So under such circumstances, it cannot be said that prosecution was able to establish beyond reasonable doubt that they have produced the articles alleged to have been seized before court in a tamper proof condition and the chemical analysis report relates to the representative sample said to have been taken from the contraband articles alleged to have been seized from the possession of the accused. If this is not established by the prosecution, then it cannot be said that prosecution was able to establish that they were succeeded in bringing home the complicity of the accused in the commission of crime. So court below has not

considered these aspects 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.

14. 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 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 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 court below is directed to refund the fine amount if any remitted by the appellant to him on making necessary application for this purpose before that court.

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

K.RAMAKRISHNAN, JUDGE

SKV