

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. 1503 of 2005 ()

SC 539/2000 of SPECIAL COURT FOR ABKARI ACT CASES, KOTTARAKKARA

APPELLANT(S)/ACCUSED:

ABDUL AZEEZ
ANZARI MANZIL, CHOZHIYAKKODU MURI
KULATHUPUZHA VILLAGE.

BY ADV. SRI.SAJU.S.A

RESPONDENT(S)/COMPLAINANT:

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

R1 BY . PUBLIC PROSECUTOR SHRI. 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.1503 OF 2005

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Dated this the 18th day of December, 2015

JUDGMENT

The accused in SC 539/2000 on the file of Additional Sessions Court for Abkari cases Kottarakkara is the appellant herein. The appellant was charge sheeted by the Sub Inspector of Police, Kulathupuzha Police Station in Crime No.144/1999 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 23.8.1999, at about 2 pm, the accused was found to be in possession of 1 ½ litres of arrack in two litres of black jerry can near the bamboo clusters on the northern side of the Teak plantation at Moonnumukku Chozhiyakkoodu 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 Magistrates Court-I, Punaloor, where it was taken on file as CP 76/1999. After complying with the formalities, the learned Magistrate committed the case to Sessions Court, Kollam under Section 209 of the Code of Criminal Procedure (hereinafter referred to as the Code). After committal, the Session's Court took cognizance of the case as SC 539/2000 and thereafter it was originally made over to Assistant Sessions Court, Kottarakkara for disposal. After establishment of Additional Sessions Court for Abkari case Kottarakkara, the learned Sessions Judge withdrew the case and made over the same to that court 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, PWs1 to 5 were examined and Exts.P1 to P5 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 he has been taken into custody by the Kulathupuzha police and falsely implicated in the case due to some enmity. Since the evidence in this case did not warrant an acquittal under Section 232 of Code, the accused was called upon to enter on his defence DW1 was examined on his side to prove his case. 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 two years and also to pay a fine of Rs.1,00,000/- and in default to undergo simple imprisonment for six months more. 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 accused/appellant before the court below.

5. When the appeal came up for hearing today, the

counsel for the appellant submitted that the appellant is no more. But he submitted that he is prepared to argue the case on merit. Since fine has been imposed as part of the sentence and the counsel for the appellant is prepared to argue the case, this court felt that this can be heard and disposed on merit.

6. Heard Shri. S.A. Saju counsel appearing for the appellant and Shri.Jibu P. Thomas, learned Public Prosecutor appearing for the State.

7. The counsel for the appellant submitted that there is inordinate delay in producing the article and delay has not been explained. Though PW5 had stated that the articles were returned by the court with instruction to produce later, there is no supporting evidence adduced on the side of the prosecution to prove the this fact. Further, the nature of seal used was not mentioned in Ext.P1 mahazar and it was not produced also. So according to the learned counsel, the court below was not justified in convicting the appellant for the offence alleged and and the benefit of doubt should have been given to the accused.

8. On the other hand, 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 there is nothing to interfere with the conviction and sentence imposed by the court below. The delay has been properly explained by the detecting officer as well.

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

On 23.8.1999, at about 2 pm, while PW5 the Sub Inspector of Police, Kulathupuzha Police Station was doing patrol duty along with PW3, the Police Constable and others, they got the information that the accused was engaged in sale of arrack from the Teak Plantation mentioned above and immediately they went to that place and saw the accused pouring some liquid in a glass to another person. On seeing the police, the person to whom the liquor was given ran away from the place. Though the accused also tried to go away from the place, they stopped him and on examination of MO1cannas, they found that it contained 1

½ litres of some liquid which on further examination, they were satisfied that it was arrack. He took 180 ml sample from the liquid and sealed and labelled the same and he had also sealed the kannas and labelled the kannas and seized the same as per Ext.P1 mahazar in the presence of PWs1 and 2. He arrested the accused and prepared Ext.P3 arrest memo. Thereafter he came to Police Station and registered Ext.P2 First Information Report as Crime No.144/1999 of Kulathupuzha Police Station against the accused under Section 55(a) of the Abkri Act. He produced the accused along with remand report before court. He produced the contraband articles seized before court along with Ext.P4 property list. On the basis of the requisition given by him, the sample was sent for analysis and Ext.P5 chemical analysis report obtained, which shows that the sample contained 29.14% by volume of ethyl alcohol. The investigation in this case was conducted by PW4. He questioned the witnesses and recorded their statements and completed the investigation and submitted final report.

10. PWs 1 and 2 are the independent witnesses to

seizure. They have denied having seen the seizure or attest of the accused. They have even denied their signatures in Ext.P1. They denied their acquaintance with the accused as well. So their evidence is not helpful to prove either the arrest or seizure of contraband articles from the possession of the accused.

11. Then the evidence available is that of PWs3 and 5 to prove this fact. PW5 is the detecting officer. According to him, while he was doing patrol duty on that day along with PW3, he got information that the accused was engaged in sale of arrack in the Teak Plantation mentioned above and immediately, he went to that place and saw the accused holding MO1 kannas and pouring some liquid in MO2 glass and there was one person standing there. On seeing the police party, the person standing there ran away from the place and accused also abandoned the articles and tried to run away from the place. But they stopped him. On examination, of the contents they were satisfied that it contained 1 ½ litres of arrack. He took sample and after completing the formalities of sealing and labelling, he

seized the same as per Ext.P1 mahazar. He arrested the accused and came to Police Station and registered the case. The evidence of PW5 on these aspects were corroborated by the evidence of PW3, the Head Constable who accompanied him. Though they were cross examined at length, nothing was brought out to discredit their evidence on this aspect. It is true that DW1 the then Panchayath member was examined to prove the false implication of the accused in the case. But his evidence will go to show that he had no direct knowledge about the incident. He had only hearsy knowledge as stated by the wife of the accused. Thereafter he asked the wife of the accused to make complaints to the authorities, later it was revealed that the accused was remanded to the custody. So he asked her to file complaint. Thereafter he was not aware of the anything about the same. So his evidence is not helpful to prove the false implication claimed by the accused. So under the circumstances, court below was perfectly justified in coming to the conclusion that the accused was arrested by PW5 with a kannas and a glass said to be containing arrack.

12. Mere arrest of the accused with some liquid alone is not sufficient to convict the accused for the offence alleged. It is for the prosecution to prove that articles seized were produced before the court without delay in a tamper proof condition and 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. The evidence of PW1 will go to show that the articles were produced before the court along with Ext.P4 property list only on 7.9.1999, though the seizure was on 23.8.1999. Though PW5 had stated that the articles were produced on the next day along with the property list, it was returned with a direction to produce later, he had admitted that it was not produced by him, but it was produced through one police constable and that police constable was not examined. He had also admitted that there is no endorsement made in Ext.P3 to that effect as well. He had no document to prove that fact also. So under the circumstances, the explanation given by PW5 regarding the delay for producing the articles cannot

be accepted. Further he had not filed any report showing these aspects when he produced the articles before court along with Ext.P4 property list.

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 if the delay has been explained in producing the article to the satisfaction of the court, court can ignore the delay and accept the articles as it was produced without any tampering. But if the delay has not been explained, then that benefit must be given to the accused. In this case there is no proper explanation given by PW5 for not producing the article in court and this court has already observed that the explanation given by him that it was produced but returned by the court cannot be accepted as well. Further the nature of seal used for sealing the article was not mentioned in Ext.P1 mahazar. Further the forwarding note was not seen marked as well. So under the circumstances, it cannot be said that prosecution was able to prove beyond reasonable doubt that the same articles said to have been seized had reached the 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 so as to connect the accused with the contraband articles and convict him for the said offence. These aspects were not properly 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 on that basis 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 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 are hereby set aside. The appellant is

acquitted of the charge levelled against him giving him the benefit of doubt. Since the appellant is no more, the fine amount if any remitted by him before the court below is directed to be returned to his legal representatives on proof of that facts before the court below.

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

K.RAMAKRISHNAN, JUDGE

SKV