

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 21ST DAY OF DECEMBER 2015/30TH AGRAHAYANA, 1937

CRL.A.No. 1520 of 2005 ()

SC 731/2003 of ADDL.DISTRICT COURT (ADHOC-IV), THIRUVANANTHAPURAM

APPELLANT(S)/ACCUSED:

KAMALAMMA, AGED 68 YEARS,
D/O.AMMUKUTTY AMMA, PUTHUVAL PUTHEN VEEDU
ADUPPUKOOTAN PARA, THIRUTHUMoola WARD, PEROORKADA
THIRUVANANTHAPURAM.

BY ADV. SRI.G.SUDHEER

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA, REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY. PUBLIC PROSECUTOR SHRI. JIBU P. THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
21-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SKV

K.RAMAKRISHNAN, J.

=====

Crl. Appeal No. 1520 OF 2005

=====

Dated this the 21st day of December, 2015

JUDGMENT

The accused in SC No.731/2003 on the file of the Additional Sessions Court (Adhoc-I), Thiruvananthapuram is the appellant herein. The appellant was charge sheeted by the Excise inspector, Thiruvananthapuram Excise Range in Crime No.25/2001 of that Excise Range under Section 8(1) and 8(2) of the Abkari Act.

2. The case of the prosecution in nutshell was that on 21.6.2000 at about 11.25 am, the accused was found to be in possession of 5 litres of arrack and found transitting the same along the lane leading to Aduppukoottan Para from Peroorkada, Nedumangadu Road in violation of the provisions of the Abkari Act and thereby he had committed the offence punishable under Section 8(1) and 8(2) of the Abkari Act.

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

Thiruvananthapuram, where it was taken on file as CP 14/2002. After complying with the formalities, the learned Magistrate committed the case to Sessions Court under Section 209 of the Code of Criminal Procedure (hereinafter referred to as the Code). After committal, the Sessions Judge took cognizance of the case SC 731/2003 and originally it was made over to Additional Assistant Sessions Court, Thiruvananthapuram for disposal. Thereafter the case was withdrawn by the Sessions Judge and made over to Additional Sessions Court (Adhoc-IV), Thiruvananthapuram for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under Section 8(1) and (2) of the Abkari Act was framed and same was read over and explained to her and she pleaded not guilty. In order to prove the case of the prosecution, PWs1 to 5 were examined and Exts.P1 to P5 and MO1 were marked on the side of the prosecution. After closure of the prosecution evidence, the accused was questioned under Section 313 of

the Code and she denied all the incriminating circumstances brought against her in the prosecution evidence. She had further stated that no article was seized from her possession and she 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 her defence, but no defence evidence was adduced on her side. After considering the evidence on record, the court below found the appellant guilty under Section 8(1) of the Abkari Act and convicted her under and sentenced her to undergo simple imprisonment for two years and also to pay a fine of Rs.1,00,000/- in default to undergo simple imprisonment for three months more. Aggrieved by the same, the above appeal has been preferred by the appellant/accused before the court below.

5. Heard Smt. Asha representing Shri.G. Sudheer Karakonam, Advocate for the appellant and Shri. Jibu P. Thomas learned Public Prosecutor appearing for the State.

6. The counsel for the appellant submitted that the

independent witnesses to seizure turned to hostile and there was no spot sample taken and as such the link between the accused and contraband article has not been established. This aspect has not been properly considered by the court below and conviction entered is not proper and she prayed for allowing the appeal.

7. On the other hand, the learned Public Prosecutor submitted that there was no delay in producing the article and the evidence will go to show that she was arrested along with contraband article and court below had considered all the aspects and rightly convicted her for the offence alleged.

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

On 21.6.2000, at about 11.25 am, while PW3 the preventive officer was doing patrol duty along with Excise guard and when they reached the place of occurrence, they saw the accused coming with MO1 Cannas in her hand and on seeing the excise party, she tried to go away from the place. So they stopped her and PW1 examined the contents

of the kannas and found that it contained 5 litres of some liquid. He tasted the same and satisfied that it was arrack. So he arrested the accused and prepared Ext.P2 arrest memo. He sealed the kannas and affixed label containing the signatures of himself and witnesses on MO1 kannas and seized the same as per Ext.P1 mahazar. Thereafter he came to excise office and produced the same before PW4, the Excise Inspector who on the basis of the documents, registered Ext.P3 crime and occurrence report as Crime No.25/2001 of that excise range against the accused under Section 8(1) of the Abkari Act. He produced the accused before the court along with remand report. He prepared Ext.P4 property list and produced the contraband articles before court. He sent forwarding note with a request to send the sample for analysis and the sample was sent from court and Ext.P5 chemical analysis report obtained. The investigation in this case was conducted by PW5, the successor of Excise Inspector. He questioned the witnesses and recorded their statements. He collected Ext.P5 chemical

analysis report and produced the same before court. He completed the investigation and submitted final report.

9. PWs1 and 2 are the independent witnesses to seizure. Though they admitted their signatures in Exts.P1, they denied having seen the excise officials arresting the accused or seizing any contraband articles from her. So their evidence is not helpful to prove the seizure or arrest of the accused. But they have admitted their signatures in Ext.P1. They also admitted that they knew the accused. So it was clear from their contact that they were helping the accused and that was the reason why they were not supporting the case of the prosecution. Then the evidence available is that of Ext.PW3, the detecting officer. He has categorically stated on that day while he was doing patrol duty and reached the place of occurrence. He found the accused coming with MO1 cannas in his hand. On seeing the excise party, she tried to go away from that place. He stopped her and examined the contents of the cannas and satisfied that it contained 5 litres of arrack. So he arrested

her and sealed and labelled the kannas and seized the same as per Ext.P1 and prepared Ext.P2 arrest memo in the presence of PWs1 and 2 and then produced her along with the contraband articles documents produced before PW4. Though he was cross examined at length, nothing was brought out to discredit his evidence on this aspect. So it can be safely concluded that the court below was perfectly justified in relying on the evidence of PW3 and coming to the conclusion that the accused was arrested by PW3 along with MO1 kannas said to be contained arrack.

10. But mere seizure of kannas with some liquid alone is not sufficient to convict the accused, for the offence alleged and it must be proved by the prosecution that the articles 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. Further the link between the accused and the contraband article has to be proved to convict the accused

for the offence alleged. In this case there was no spot sample taken and there is no evidence adduced on the side of the prosecution to prove as to whether any request has been made for drawing sample and sample was drawn from court and he was sent from court. It is true that in Ext.P4 property list, there is an endorsement that the sample taken and the kannas can be returned for custody of the excise officials. But that alone is not sufficient to prove that sample was taken from court from the contraband article alleged to have been seized from the possession of the accused.

11. In the decision reported in Sasidharan v State of Kerala [2007 (1) KLT 720], this court has considered the question the procedure to be followed in cases where spot sample was not taken and same was taken from court and in the decision it has been observed as follows:-

"Without the link evidence of actual sampling by the concerned clerk of the court by drawing sample from the can and sending the same in a sealed packet to the Chemical Examiner with a specimen seal sent separately for tamper proof despatch, the Prosecution cannot be held to have brought home the offence against the appellant. The prosecution had a duty to prove that it was the sample taken from the contraband liquor

seized from the accused which had reached the hands of the Chemical Examiner in a fool proof condition.

Committing Magistrates have to take care that contemporary proceedings evidencing the drawing of sample and sending the same to the Chemical Examiner in a tamper proof-condition are recorded in the proceedings before court. Sessions Judges trying such cases also should ensure that the concerned member of the staff, who had drawn the sample and despatched the same to the Chemical Examiner duly packed and sealed under the covering letter of the Magistrate, is examined before court during trial. The Public Prosecutor in charge of the case also had a duty to file an additional witness- list for examining the thondy section clerk (property clerk) concerned so as to establish the nexus between the contraband substance and the accused”.

12. Further in the decision reported in *Nalinakshan v State of Kerala* [2012 (4) KLT 575] also that this court has held that if the sample was taken from court and forward to chemical examiner, unless the person who drawn the sample was examined to prove the procedure followed by him, it cannot be said that the prosecution has proved beyond reasonable doubt that the chemical analysis report relates to the representative sample of the sample said to have been taken from contraband articles alleged to have been seized from the possession of the accused so as to connect the

accused with the contraband article and if this link is not proved, then it cannot be said that prosecution has succeeded in bringing home the complicity of the accused in the commission of crime and that benefit must be given to the accused. This aspect has not been considered by the court below before coming to the conclusion that prosecution has proved beyond reasonable doubt that the accused had committed the offence and consequential conviction entered by the court below against the appellant for the offence under Section 8(1) of the Abkari Act is against law and the same is liable to be said aside. So the appellant is entitled to get acquittal of the charge levelled against him giving him the benefit of doubt.

13. In view of the finding that 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 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 court below is directed to refund the fine amount if any remitted by the appellant to her on making necessary application for that purpose.

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

Sd/-
K.RAMAKRISHNAN, JUDGE

SKV