

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

THURSDAY, THE 8TH DAY OF OCTOBER 2015/16TH ASWINA, 1937

CRL.A.No. 1538 of 2005 ()

AGAINST THE JUDGMENT IN SC 135/2004 of ADDITIONAL DISTRICT COURT
(ADHOC-I), THODUPUZHA DATED 03-08-2005

APPELLANT/1ST ACCUSED:

KURIAKOSE, S/O.VARGHESE,
PADIKKAKUDIYIL VEEDU, SENAPATHI KARA
KANTHIPPARA VILLAGE.

BY ADV. SRI.S.ARUN RAJ

RESPONDENT/COMPLAINANT:

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

BY PUBLIC PROSECUTOR SMT.SEENA RAMAKRISHNAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 08-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. RAMAKRISHNAN, J.

.....
Crl.A.No.1538 of 2005
.....

Dated this the 8th day of October, 2015.

JUDGMENT

The first accused in SC.No.135/2004 on the file of the Additional Sessions Court (Adhoc-I), Thodupuzha is the appellant herein.

2. The appellant along with two others were charge sheeted by the Circle Inspector of Police, Devikulam in Crime No.311/2001 of Santhanpara police station under sections 8(1) and (2) of the Abkari Act.

3. The case of the prosecution in nutshell was that on 15.9.2001, at about 4.30 p.m, the accused persons were found to be in possession of 14 litres of arrack in 3 cannases at the north eastern bushy forest land of an extent of about 4 acres north of the post office at Senapathy situated on the north of the Senapapthy- Rajakumari panchayat road near Senapathy junction of Senapathy Kara in Kanthipara village in violation of the provisions of the Abkari Act and thereby they have committed the offences punishable under sections 8(1) read with 8(2) of the Abkari Act.

4. After investigation final report was filed and it was taken on file as C.P.No.83/2002 on the file of the Judicial First Class Magistrate Court, Nedukandam. After completing the formalities, learned Magistrate committed the case to the Sessions Court, Thodupuzha and originally the case was made over to the Assistant Secessions Court, Kattapana for disposal. Thereafter it was withdrawn by the Sessions Court and made over to the Additional Sessions Court (Adhoc-I), Thodupuzha for disposal.

5. When the accused appeared before the court below, after hearing both sides, charge under sections 8(1) and (2) of the Abkari Act was framed and the same was read over and explained to them and they pleaded not guilty. In order to prove the case of the prosecution, Pws 1 to 4 were examined, Exts.P1 to P6 and MO1 series , MO2 and MO3 series were marked on the side of the prosecution. After closure of the prosecution evidence, the accused were questioned under section 313 of the Code of Criminal Procedure (hereinafter referred to as 'the Code') and they denied all the incriminating circumstances brought against them in the prosecution evidence. According to the appellant, he was taken into custody by the police while

coming from the barber shop after cutting the hair of his grandchildren and he had been falsely implicated in the case. Since evidence in the case did not warrant an acquittal under section 232 of the Code, the accused were called upon to enter on their defence. DW1 was examined on the side of the accused to prove his case. After considering the evidence on record, the court below found accused 2 and 3 not guilty of the offence and they were acquitted of the charge levelled against them giving them the benefit of doubt under section 235(1) of the Code. But the court below found the appellant guilty under section 8(1) of the Abkari Act and convicted him thereunder and sentenced him to undergo rigorous imprisonment for three months and also to pay a fine of Rs.One lakh, in default to undergo simple imprisonment for one month. Set off was allowed for the period of detention already undergone. Aggrieved by the same, the present appeal has been preferred by the appellant/first accused before the court below.

6. Heard Sri.Arun Raj S, counsel appearing for the appellant and Smt. Seena Ramakrishnan, Public Prosecutor appearing for the State.

7. Counsel for the appellant submitted that nature of label affixed was not mentioned in Ext.P2 mahazer. Further though the detention was on 15.9.2001, the articles were produced before court only on 24.10.2001. The explanation given by PW1 was that though it was produced along with the accused on the next day itself, it was returned and thereafter it was produced in court only on 15.2.2002 and there was no specimen seal provided and as such it cannot be said that the articles reached the court in a tamper proof condition and Ext.P5 chemical analysis report relates to representative sample said to have been taken from the contraband article said to have been seized from the possession of the accused. The court below was not justified in convicting the accused for the above reasons. So according to him, the appellant is entitled to get acquittal.

8. On the other hand, Public Prosecutor submitted that PW1 had given evidence regarding production of articles and Ext.P2 seizure mahazer shows the nature of specimen seal used for sealing the article. So court below had appreciated the evidence properly and rightly convicted the appellant and the finding does not call for interference.

9. The case of the prosecution as emerged from the

prosecution witnesses was as follows:

On 15.9.2001, PW1 along with PW3 were doing patrol duty and at that time, when they reached the place of occurrence, behind the post office at Senapthi junction, they saw three persons coming with Mo1 series cannases and on seeing the police party, two persons abandoned the cannases in their hand and they ran away from the place and another person also tried to run away from the place, they stopped him and brought him to the place and on examination of the cannases, they found that cannases contained 10, 2.5 and 1.5 litres respectively of arrack and MO2 glass was also found and in a plastic bag they found MO3 series rubber bands. Thereafter arrested the first accused from the place and took sample from each cannas and sealed the same and affixed label and thereafter sealed the cannases and also labelled the same in the same fashion and seized the same as per Ext.P2 mahazer in the presence of PW2 and another. He came to the police station and prepared Ext.P1(a) report on the basis of which registered Ext.P1 First Information Report as Crime No.311/2001 of Santhanpara police station against the accused persons under section 8(1) of the Abkari Act. The investigation

in the case was conducted by PW4, the Circle Inspector of Police. He questioned the witnesses and recorded their statements and he sent Ext.P4 forwarding note with request to send the samples for analysis. On that basis, samples were sent for analysis and Ext.P5 report obtained which shows that the sample contained ethyl alcohol. He produced Ext.P6 report showing name and addresses of the accused persons. He completed the investigation and submitted final report.

10. PW2 is an independent witness to the seizure and attestor to Ext.P2 mahazer. Though he admitted the signature in Ext.P1, he denied having seen the seizure. According to him, he had signed the same from the barber shop of DW1. So his evidence is not helpful to prove the seizure but from the circumstances, it can be seen that he is trying to help the accused and that was the reason why he is not supporting the case of the prosecution. Then the evidence is that of Pws 1 and 3, the detecting officer and police constable, who accompanied the detecting officer to prove the seizure and arrest. PW1 had deposed that he was doing patrol duty along with PW3 and when they reached the place of occurrence, they saw the accused persons with MO1 series cannases and on

seeing them, all the three accused persons abandoned the cannases and articles in their possession and ran away from the place and they chased them and caught hold of the first accused alone. They could not succeed in catching of other accused persons. Thereafter he examined the contents of the cannases and found the cannases contained 10, 2.5 and 1.5 litres of arrack respectively and he took sample from each cannas and sealed sample bottle and affixed label and sealed cannases. He had seized MO1 series cannases, MO2 glass and MO3 series rubber band in a plastic bag along with the sample bottle after describing the same in Ext.P2 mahazer. He arrested the first accused, came to police station and registered the crime. PW3 had corroborated the evidence of PW1 on these aspects. Though Pws 1 and 3 were cross examined at length, nothing was brought out to discredit their evidence regarding seizure of MO1 series, Mos 2 and 3, and arrest of the first accused. DW1 was examined on the side of the accused to prove that first accused had come to his shop along with his grant children for hair cutting and after hair cutting, while he was going back to his house, he was taken by the police. But on going through the evidence of DW1, it

will be seen that he is known to the accused and he is trying to help the accused and that was the reason why he came before court and gave evidence in support of the first accused. Further no complaint was made to any authorities regarding the false implication of first accused in a case like this. So under the circumstances, the court below was perfectly justified in discarding the evidence of PW1 and believing the evidence of Pws 1 and 3 and rightly came to the conclusion that the prosecution was able to establish beyond reasonable doubt that the first accused was arrested with MO1 series cannases and Mos and 3 were also seized from his possession.

11. Mere seizure of some cannases with some liquid alone is not sufficient to come to the conclusion that accused was found to be in possession of arrack. It must be proved by the prosecution that same articles alleged to have been seized from the possession of the accused had reached the court in tamper proof condition and the sample reached chemical examiner's laboratory in a tamper proof condition so as to come to a conclusion that chemical analysis report represents the samples said to have been taken from the contraband articles seized from the accused. In this case, it will be seen

from Ext.P3 property list that property list reached the court only on 24.10.2001 though detection was on 15.9.2001. It is true that PW1 had deposed that along with the remand report and the accused, property list was also produced and the properties were also produced but it was returned for safe custody to be produced later in court. But there was no such endorsement made in Ext.P3 property list. If really it was produced along with the remand report, the initial of the magistrate will be there on the property list which is missing in this case. On the other hand, it will be seen from Ext.P3 that it was produced before court on 24.10.2001 and endorsement made by the Magistrate shows that verify and accept the same and as per the office note, return items 1, 2 and 7 and an order was passed by the Magistrate on the same day to return those articles alone. So it will clearly show that contraband articles were produced before court on 24.10.2001. So there is no explanation forthcoming from the side of PW1 as to why he had kept the articles so long and why a report has not been filed for the delay in producing the article as well.

12. Further, it will be seen from the evidence of PW4 that he had no occasion to see the contraband articles said to have

been seized and in the possession of PW1. Further the forwarding note in this case was sent to court only on 15.2.2002. Quite unfortunately the specimen seal impression was not seen affixed in the forwarding note and there is no explanation forthcoming for the same as well. Further in Ext.P5 chemical analysis report also there is nothing mentioned about the seal seen on sample bottle and it was only mentioned that one sealed packet and three sealed bottles were received and seals seen were intact. So there is nothing mentioned in the same that seal seen on the bottles were verified and they were tallied with the specimen seal provided. So all these things create suspicion regarding genuineness of the article produced before court.

13. In the decision reported in ***Sasidharan v. State of Kerala*** (2007(1) KLT 720) this Court held that there is a duty cast on the prosecution to prove the link between the contraband articles seized and the accused and if this link is not proved, it cannot be said that the prosecution has succeeded in bringing home the complicity of the accused in the commission of the crime. Further in the same decision it has been observed that specimen seal impression of the seal

used for sealing the article must be produced along with the forwarding note. If such seal is not seen in the forwarding note and if the forwarding note was not marked, then it cannot be said that the chemical analysis report relates to representative sample said to have been taken from the contraband article seized from the possession of the accused so as to convict the accused for the offence alleged.

14. Further in the decision reported in ***Ravi v. State of Kerala*** (2011 (3) KHC 121), a Division Bench of this Court has held that if the delay in producing the article has not been explained, then that benefit must be given to the accused. It is not necessary always that the delay is fatal if it is explained to the satisfaction of the court. In this case, there was a delay of more than 38 days in producing the article which has not been properly explained and the explanation given by PW1 is not satisfactory and against documentary evidence produced before court. Further there is no specimen seal impression affixed in the forwarding note as well so as to come to the conclusion that the same sample had reached the chemical examiner's laboratory and the report relates to that article as well. So under the circumstances, it cannot be said that the

prosecution has proved beyond reasonable doubt that the link between the accused, contraband article and the chemical analysis report relates to the representative sample said to have been taken from the contraband article said to have been seized from possession of the accused and that benefit must be given to the accused. Court below had not considered these aspects in the right perspective before coming to the conclusion that the prosecution has proved beyond reasonable doubt that the appellant was found to be in possession of arrack and consequential conviction entered by the court below against the appellant for the offence under section 8(1) of the Abkari Act is not sustainable 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. In view of my finding that the appellant is entitled to get acquittal, the sentence imposed is 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 8(1) read with 8(2) 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. If any fine amount is remitted by the appellant, the court below is directed to return the same to the appellant on making necessary application in that regard.

Office is directed to communicate a copy of this judgment to the concerned court immediately.

Sd/-
K. RAMAKRISHNAN, JUDGE.

/true copy/

P.S to Judge

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