

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

FRIDAY, THE 4TH DAY OF DECEMBER 2015/13TH AGRAHAYANA, 1937

CRL.A.No. 1916 of 2004 (C)

**AGAINST THE JUDGMENT IN SC 48/2003 of ADDL. SESSIONS UJGE, FAST TRACK-I,
ALAPPUZHA DATED 16-11-2004**

APPELLANT(S)/ACCUSED:

**MOHANAN, S/O RAGHAVAN
KOCHUKALEECKEL, PALAMURI, KANNAMANGALAM
MAVELIKARA.**

**BY ADVS.SRI.JIJI MATHEW
SRI.A.MUJEEB REHUMAN
SRI.N.SURESH**

RESPONDENT/COMPLAINANT:

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

BY ADV. JIBU P.THOMAS, PUBLIC PROSECUTOR

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 04-12-2015, THE COURT
ON THE SAME DAY DELIVERED THE FOLLOWING:**

CRL.A.No. 1916 of 2004 (C)

APPENDIX

PETITIONER'S ANNEXURE:

A1 : COPY OF THE JUDGMENT IN SC NO.48/2003 PASSED BY THE
ADDITIONAL SESSIONS JUDGE, FAST TRACK-I, ALAPPUZHA

RESPONDENT'S ANNEXURE: N I L

//TRUE COPY//

P.A. TO JUDGE

JV

K. RAMAKRISHNAN, J.

Crl. Appeal No.1916 of 2004

Dated this the 4th day of December, 2015

JUDGMENT

Accused in S.C.No.48/2003 on the file of the Additional Sessions Court, Fast Track-I, Alappuzha is the appellant herein. The appellant was charge-sheeted by the Excise Inspector, Mavelikkara Excise Range in Crime No.94/2000 of Mavelikara Excise Range under Section 8(1) of the Abkari Act.

2. The case of prosecution in nutshell was that on 30.09.2000, at about 7 pm, the accused was found to be in possession of 2 litres of arrack and found transiting the same along the western side of Kolattethu Kizhakkathil Veedu for the purpose of sale in violation of the provisions of Abkari Act and thereby he had committed the offence under Section 8(1) of the Abkari Act.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court, Mavelikkara where it was taken on file as C.P.No.51/2002. After complying with the formalities, the learned Magistrate committed the case to

Sessions Court, Alappuzha under Section 209 of the Criminal Procedure Code. After committal, Sessions Judge took cognizance of the case as S.C.No.48/2003 and made over to Principal Assistant Sessions Court, Alappuzha for disposal. Thereafter, the case was withdrawn and made over to Additional Sessions Court Fast Track - I for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under Section 8(1) 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, PWs. 1 to 6 were examined and Exts.P1 to P5 and MOs. 1 and 2 were marked on their side. After closure of the prosecution evidence, the accused was questioned under Section 313 of the Code of Criminal Procedure. He denied all the incriminating circumstances brought against him in the prosecution evidence. He had further stated that he had not committed any offence and no article was seized from his possession and while he was returning after his work, he was taken into custody by the Excise Officials 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 of Criminal

Procedure, 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, court below found the appellant guilty under Section 8(1) of Abkari Act and convicted him thereunder and sentenced him to undergo rigorous imprisonment for two years and also to pay a fine of Rupees One lakh in default to undergo simple imprisonment for one year. Set off was allowed for the period of detention already undergone under Section 428 of the Code of Criminal Procedure. Aggrieved by the same, the present appeal has been preferred by the appellant accused before the court below.

5. The case was posted in the disposal list. Since there was no appearance for the appellant even today, this Court has decided to dispose of the case on merit, after hearing Sri Jibu P. Thomas, learned Public Prosecutor appearing for the State and after perusing the records.

6. The learned Public Prosecutor submitted that the evidence adduced in the case proved the case against the accused beyond reasonable doubt and the articles were produced before the court on 01.10.2000 itself and as directed by the court, it was produced later. So there is no delay in

producing the article and court below had considered all the aspects and rightly convicted the accused.

7. The case of the prosecution as emerged from the prosecution witnesses was as follows: On 30.09.2000, at about 7 pm, while PW-1, the Excise Inspector attached to Mavelikara Circle Office, alongwith PW-5, the preventive officer attached to Mavelikkara Circle Office were doing patrol duty, and when they reached the place of occurrence, they saw the accused standing by the side of the Kolattethu Kizhakkathil Veedu at Pela Muri in Kannamangalam village with MO.1 bottle and MO.2 glass and on seeing them, he tried to move away from the place. So he stopped him and when he examined MO.1 bottle, he found that it contained 2 litres of liquid and on further examination, he was satisfied that it was arrack. When he smelt the glass, he felt the smell of arrack in that glass also. He took 200 ml sample from the liquid in MO.1 bottle and sealed the same and affixed label containing signatures of himself and accused and the witnesses. He sealed and labelled MO. 1 bottle in the same fashion and affixed label in the same fashion on MO.2 glass as well. Thereafter, he arrested the accused and prepared Ext.P2 arrest memo and gave arrest intimation to his relatives. He seized the

articles as per Ext.P1 mahazar in the presence of PWs. 3 and 4. Thereafter, he came to the Circle Office and sent the accused and the articles seized alongwith documents to Range Office for necessary action. When the accused alongwith the contraband articles and the documents were produced before PW-2, the Excise Inspector of Mavelikara Excise Range, he registered Ext.P3 crime and occurrence report as Crime No.94/2000 of Mavelikara Excise Range against the accused under Section 8(1) of the Abkari Act. He produced the accused before the Magistrate on 01.10.2000 alongwith remand report and he was remanded to custody. He had produced the articles also alongwith Ext.P4 property list and they were returned to him with a direction to produce before court on a subsequent day and he had produced the same. The evidence given by PW-1 regarding the arrest and seizure were corroborated by the evidence given by PW-5 preventive officer who accompanied him. The investigation in this case was conducted by PW-6, who questioned the witnesses and recorded their statements. He collected Ext.P5 chemical analysis report, completed the investigation and submitted final report.

8. PWs. 3 and 4 were the independent witnesses of

seizure. They have denied having seen the seizure or arrest of the accused and they were even denied their signature in Exts.P1 and P2. Though PW-3 admitted that their signature in the summons appears to be identical, PW-4 had even denied his signature in summons. So it is clear from their evidence that they were trying to help the accused and that was the reason why they were not supporting the case of the prosecution fully.

9. Then the evidence available to prove the seizure is that of excise officials namely PW-1 and PW-5. PW-1 is the detecting officer who was working as Excise Inspector in the Excise Circle Office, Mavelikara. According to him, on 30.09.2000 at about 7 pm, he was doing patrol duty alongwith PW-5 the preventive officer attached to the same office and when they reached the place of occurrence, they saw the accused standing with MO.1 bottle and MO.2 glass in his hand. On seeing the excise party, he got perplex and tried to run away from the place. So he stopped him. On examination of MO.1 bottle, he was satisfied that it was arrack having a quantity of two litres. When he examined MO.2 glass, he found that it was having a smell of arrack. He took sample and sealed the sample bottle and labelled the same and also sealed and labelled MO.1

bottle and affixed and labelled on MO.2 glass and seized these articles as per Ext.P1 mahazar. Therefore, he arrested the accused and prepared Ext.P2 arrest memo. Thereafter, he came to his office and produced the accused and the contraband articles before PW-2 for further action. The evidence of PW-1 on these aspects was corroborated by the evidence of PW-5, the preventive officer who accompanied him. Though they were cross-examined at length, nothing was brought out to discredit their evidence on this aspect. Further, no evidence was adduced on the side of the accused to prove that he was taken from some other place as claimed by him and falsely implicated in the case. So under the circumstances, court below was perfectly justified in coming to the conclusion that the accused was arrested by PW-1 along with a bottle and glass said to be containing arrack.

10. Mere seizure of some bottle with liquid alone is not sufficient to convict the accused for the offences alleged. It must be further proved by the prosecution that the articles reached the court in the same condition in which it was seized and the chemical analysis report relates to the representative sample said to have been taken from the contraband article seized from possession of the accused. It is true that in this case, the articles

were produced before the learned Magistrate on 1.10.2000 and it is seen from Ext.P4 property list that Item No.2 which is the sample returned to the Excise Inspector and he has been directed to produce the same before court on 05.10.2000. But it is seen from the records that it was produced before court only on 10.10.2000. PW-2 had not explained the delay for producing the article after it was handed over to him. He also did not state as who was in possession of the same till it was produced in court. He had admitted in his evidence that he did not obtain the specimen seal impression of the seal used for sealing the sample. There is nothing mentioned in Ext.P1 seizure mahazar also regarding the nature of seal used. He had not mentioned that he had prepared the forwarding note and sent the forwarding note to the court also. The forwarding note was not seen marked in this case so as to find out as to whether the specimen seal impression of the seal used for sealing the sample bottle was provided for the purpose of comparison by the chemical examiner to satisfy regarding the genuineness of the sample produced. So under the circumstances, it cannot be said that merely because the chemical analysis report shows that the seal on the bottle tallies with the specimen seal impression produced

that relates to the specimen seal impression of the seal actually used for sealing the bottle by PW-1. PW-1 also did not mention about the nature of seal used for sealing the article. He had no occasion to later see the bottle as well. So under the circumstances, it cannot be said that prosecution was able to establish that the sample bottle had reached the court and the chemical examiners lab in a tamper proof condition so as to come to the conclusion that the chemical analysis report relates to the representative sample said to have been taken from the contraband article alleged to have been seized from possession of the accused so as to convict him for the offence alleged. This was so held in the decision reported in **Krishnan v. State of Kerala [2015 (1) KHC 822]**. These aspects were not properly considered by the court below before coming to the conclusion that the prosecution has proved the case against the accused beyond reasonable doubt and consequential conviction entered by the court below against the appellant 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.

11. 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, 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) of the Abkari Act are hereby set aside. 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 that purpose.

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

sd/-
K. RAMAKRISHNAN,
JUDGE

JV