

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

WEDNESDAY, THE 4TH DAY OF NOVEMBER 2015/13TH KARTHIKA, 1937

CRL.A.No. 1921 of 2004 (A)

**(SC.NO. 194/2003 OF ADDL.DISTRICT AND SESSIONS COURT, FAST TRACK
(ADHOC-1), KOZHIKODE DATED 10-11-2004)**

APPELLANT/ACCUSED:

**JOSE P.V., S/O.ULAHANNAN,
PATTARKARA HOUSE, PUTHUPPADY VILLAGE,
PUTHUPPADY DESOM, KOZHIKODE.**

**BY ADVS.SRI.P.S.SREEDHARAN PILLAI
SRI.C.S.SUNIL**

RESPONDENT/COMPLAINANT:

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

BY PUBLIC PROSECUTOR SRI.JIBU P. THOMAS

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 04-11-2015, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:**

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K.RAMAKRISHNAN, J.

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Crl. Appeal No. 1921 OF 2004

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Dated this the 4th day of November, 2015

JUDGMENT

The accused in SC 194/2003 on the file of the Additional Sessions Court (Adhoc-I) Kozhikode is the appellant herein. The appellant was charge sheeted by the Excise Inspector, Thamarassery Excise Range in Crime No.13/2000 of that Excise Range under Section 55 (a) of the Abkari Act (ought to have been under Section 8 (1) of the Abkari Act).

2. The case of the prosecution in nutshell was that on 30.7.2000, at about 7 am, the accused was found to be in possession of 2 litres of arrack in a 5 litre cannas and found transitting the same through the road in front of Puthuppady Government High School in violation of the provisions of the 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 Court-I, Thamarassery and it was committed to the Sessions Court by the learned Magistrate under Section 209 of the Code of Criminal Procedure (hereinafter referred to as the Code). After committal, the case was taken on file as SC 194/2003 on the file of the Sessions Court, Kozhikode and it was originally made over to 2nd Additional Assistant Sessions Court, Kozhikode for disposal. Thereafter the case was withdrawn by the Sessions Judge and made over to Additional Sessions Court (Adhoc-1) Kozhikode for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under Section 55 (a) of Abkari Act (ought to be 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 PWs1 to 5 were examined and Exts.P1 to P6 and MO1 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 had not committed any offence and 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 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/- in default to undergo simple imprisonment for 6 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 above appeal has been preferred by the appellant/accused before the court below.

5. Heard Shri Sandeep, counsel representing Shri.P.S Sreedharan Pillai, counsel for the appellant and Shri.P.S. Sajeew learned Public Prosecutor appearing for the State.

6. The counsel for the appellant submitted that the independent witness to seizure did not support the case of the prosecution and he denied having witnessed the seizure. He had also argued that there was a delay of one day in producing the article and that has not been explained. There is contradiction in the evidence of PWs1 and 2 regarding the manner in which seizure was effected. So according to the learned counsel, the court below was not justified in convicting the appellant for the offence alleged. The counsel also submitted that if the court is not inclined to interfere with conviction, the sentence imposed is harsh and prayed for leniency.

7. Learned Public Prosecutor submitted that there was no delay in producing the article. The report of seizure was informed to the court on the same day and specimen seal impression was also produced on the same

day. The court below has considered all the aspects and rightly convicted the appellant and no interference is called for.

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

On 30.9.2000, PW1 was working as Excise Inspector, Thamarassery Excise Range and he was doing patrol duty along with PW2 the Preventive officer and when they were passing through the road leading to Chemparappara. from Puthuppady Telephone Exchange, Puthuppady Amsam Desom of Kozhikode Taluk and when they reached in front of Puthuppady Government U.P. School, they saw the accused coming with MO1 cannas in his hand and on seeing the Excise party, he tried to flee away from that place. So they stopped the vehicle and intercepted the same. PW1 verified the cannas which is having a capacity of 5 litre and it contained 2 litres of liquid. He examined the same by smelling and tasting and he was convinced that it was arrack and he convinced the same to the witnesses as well. He arrested the accused and prepared

Ext.P1 arrest memo. He took sample from the liquid and sealed the same and affixed label containing the signatures of himself the accused and the witnesses. He sealed and labelled the kannas also in the same fashion. Thereafter he seized the same as per Ext.P2 seizure mahazar in the presence of PW3 and another. He gave intimation of arrest to the relative of the accused.

9. He came to Excise office and registered Ext.P3 occurrence report as CR No.13/2000 of Thamarassery Excise Range against the accused under Section 55(a) of the Abkari Act. He prepared Ext.P4 property list. He produced the accused on the same day along with remand report and accused was remanded to custody. He produced the article before the court on 31.7.2000 along with Ext.P4 property list. He sent Ext.P5 forwarding note with the request to send the sample for analysis and the sample was sent from court and Ext.P6 chemical analysis report obtained which shows that the sample contained 26.55% by volume of ethyl alcohol. The investigation in this case was conducted by PW4. He questioned the

witnesses and recorded their statements. Further investigation in this case was conducted by PW5, who verified the investigation conducted by PW4 and submitted final report before the court.

10. PW3 is the independent witness to seizure. Though he admitted the signature in Ext.P1 arrest memo and Ext.P2 seizure mahazar, he denied having seen the seizure or arrest of the accused. He had admitted that he knew the accused. So it is clear from this that he was now trying to help the accused and that was the reason why he did not support the case of the prosecution.

11. Then the evidence available is that of PWs1 and 2 the detecting officer and the officer who accompanied the detecting officer to prove the seizure and arrest. PW1 had categorically stated that on that day, while he was doing patrol duty and when they reached near Puthuppady Government U.P. School, they saw the accused coming with MO1 kannas in his hand and on seeing the police party, he tried to go away from that place. So they stopped him. He verified the contents of

MO1 kannas by smelling and tasting and he was satisfied that it was arrack. He took sample and sealed and labelled the sample bottle and the kannas and seized the same as per Ext.P2 seizure mahazar. He arrested the accused and prepared Ext.P1 arrest memo. Thereafter, he came to Excise Office along with the accused and the contraband articles and registered the case. PW2 had corroborated the evidence of PW1 on this aspect. Though they were cross examined at length, nothing was brought out to discredit their evidence regarding the seizure of MOI kannas with liquid said to be arrack and arrest of the accused from spot.

12. It is settled law that merely because seizure witness did not support the case of the prosecution is not a ground to disbelieve the case of the prosecution. Court can rely on the evidence of the official witnesses if it is satisfied with its trustworthiness and reliability. No enmity was brought out for PWs1 and 2 to give any false evidence against the accused. So under the circumstance, the court below was perfectly justified in believing the

evidence of PWs1 and 2 and coming to the conclusion that prosecution has proved beyond reasonable doubt that the accused was arrested on 30.7.2000 at 7 am in front of Puthuppady Government U.P. School along with MO1 kannas.

13. PWs1 and 2 have identified MO1 as the kannas seized from his possession. Further it is seen from the documents produced that the seizure mahazar and the accused along with the arrest memo and occurrence report were produced on the court on the same day and the accused was remanded to custody. The property was produced before the court on the next day itself and PW1 had explained that he was in possession of the article till it was produced in court. Further Ext.P5 forwarding note shows the specimen seal impression was provided and Ext.P6 chemical analysis report shows that the seal seen on the bottle tallied with the seal provided. So it can be safely concluded that prosecution has proved beyond reasonable doubt that the articles were produced before the court and reached the chemical analysis laboratory in

a tamper free condition and the chemical analysis report relates to the sample said to have been taken from the contraband articles said to have been seized from the possession of the accused. PWs1 and 2 have have categorically stated that article seized was arrack. There is no case for the defence that the article seized was not arrack. Possession of arrack is an offence punishable under Section 8(1) read with Section 8(2) of the Abkari Act. So the court below was perfectly justified in convicting the appellant for the offence alleged under Section 55(a) of the Abkari Act (ought to be under Section 8(1) read with Section 8(2) of the Abkari Act. So the conviction is converted into one under Section 8(1) read with 8(2) of the Abkari Act.

14. The counsel for the appellant submitted that the sentence imposed is harsh. Court below sentenced the accused to undergo rigorous imprisonment for 2 years and also to pay a fine of Rs.1,00,000/- in default to undergo simple imprisonment for 6 months. Set off was allowed for the period of detention already undergone by

him.

15. Persons who are committing offence under the Abkari Act were doing the same knowing that they are committing the offence and ignoring the consequence of their act on innocent people who are consuming the illegally manufactured arrack which was sold by them. So they must be dealt with severely, as they are doing it for the personal gain. Showing undue leniency in imposing sentence in such will only give wrong signal to the society and it will cause loss of confidence in the people in the criminal justice delivery system. But at the same time, court can take note of the antecedent of the accused, his family back ground and possibility of reformation also before imposing the sentence as mitigating circumstance to show leniency. In this case it is seen from the order that there is no case for the prosecution that he was a habitual offender of committing similar offence. He was aged only 39 years at the time when he committed the crime. He is now living with family. A fine of Rs.1,00,000/- has already been imposed as part of the

sentence. So considering these aspects this court feels that reducing the substantive sentence to 9 months rigorous imprisonment and default sentence of 3 months simple imprisonment, retaining the fine amount will be sufficient and that will meet the ends of justice. So the substantive sentence and default sentence are set aside and the same is modified as follows:

The appellant is sentenced to undergo rigorous imprisonment for 9 months and also to pay a fine of Rs.1,00,000/- in default to undergo simple imprisonment for 3 months. Set off is allowed for the period of detention already undergone under Section 428 of the Code.

In the result the appeal is allowed in part. The order of conviction passed by the court below is confirmed but converted to one under Section 8(1) read with Section 8 (2) of the Abkari Act instead of Section 55(a) of the Abkari Act and sentence of fine of Rs.1,00,000/- imposed is also confirmed. But the substantive sentence of 2 years rigorous imprisonment and default sentence of 6

months simple imprisonment are set aside and the same is modified as follows:

The appellant is sentenced to undergo rigorous imprisonment for 9 months and also to pay a fine of Rs.1,00,000/- in default to undergo simple imprisonment for 3 months. Set off is allowed for the period of detention already undergone under Section 428 of the Code.

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

K.RAMAKRISHNAN, JUDGE

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