

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

FRIDAY, THE 6TH DAY OF NOVEMBER 2015/15TH KARTHIKA, 1937

CRL.A.No. 1924 of 2004 ()

SC 1137/2002 OF ADDITIONAL DISTRICT COURT (FAST TRACK-1),
THIRUVANANTHAPURAM

PETITIONER/ACCUSED::

SUMATHY, D/O.KUNJI,
MAVARATHALA PANAYIL VEEDU, UP 12/320, CHECHERI
MURI, ULLOOR VILLAGE, THIRUVANANTHAPURAM TALUK.

BY ADVS.SRI.SASTHAMANGALAM S. AJITHKUMAR
SRI.KRISHNADAS P. NAIR
SMT.K.L.SREEKALA
SRI.HARIDAS P.NAIR

RESPONDENT/COMPLAINANT::

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

R1 BY PUBLIC PROSECUTOR SMT. SEENA RAMAKRISHNAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 06-11-
2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SKV

K.RAMAKRISHNAN, J.

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Crl. Appeal No.1924 OF 2004

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Dated this the 6th day of November, 2015

JUDGMENT

Accused in SC No.1137/2002 on the file of the Additional Sessions Court (Fast Track-I) Thiruvananthapuram is the appellant herein. The appellant was charge sheeted by the Excise Inspector, Thiruvananthapuram Excise Range 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 15.2.2000, at about 5.45 pm, the accused was found to be in possession of 3 litres of arrack in a 5 litre cannas in her house with No.UP12/320 known as Panayil House, Mavalathara in Ulloor Village for the purpose of the sale in violation of the provisions of the Abkari Act and thereby she had committed the above said offence.

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

Thiruvananthapuram, where it was taken on file as CP No.109/2001. After complying with the formalities the learned Magistrate committed the case to Sessions Court Thiruvananthapuram, where it was taken on file as SC No.1137/2002 and thereafter it was made over to Assistant Sessions Court, Thiruvananthapuram for disposal. Thereafter it was withdrawn by the Sessions Court and made over to Additional Sessions Court (Fast Track-I) Thiruvananthapuram for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under Section 55 (a) of the Abkri Act was framed and same was read over and explained to her but she pleaded not guilty. In order to prove the case of prosecution PWs 1 to 4 were examined and Exts.P1 to P8 were marked on their side. 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 she had not committed any offence and she had been falsely

implicated in the case. Since the Excise officials were unnecessarily harassing her, her daughter had filed the case against the officials before the Medical College Police Station. On account of that enmity, she had 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 (hereinafter referred to as the Code), the accused was called upon to enter on her defence, but no oral evidence was adduced on her side and Exts.D1 and D2 were marked through PW1 as defence documents on the side of the accused. After considering the evidence on record, the court below found the appellant guilty under Section 55(a) of the Abkari Act and convicted her thereunder and sentenced her to undergo simple imprisonment for 1 ½ years and also to pay a fine of Rs.1,00,000/- in default to undergo simple imprisonment for 6 months more. Set off was allowed for the period of detention already undergone by her under Section 428 of the Code. Aggrieved by the same, the present appeal has been preferred by the appellant/accused before the court

below.

5. Heard Shri. Sasthamangalam S. Ajithkumar, counsel appearing for the appellant and Smt. Seena Ramakrishnan, learned Public Prosecutor appearing for the State.

6. Counsel for the appellant submitted that though the detection was alleged to have been made on 15.2.2000, the documents were produced before the court and also the property was produced before the court only on 17.2.2000 and there is no explanation forthcoming for the same. Further there is no proper evidence adduced on the side of the prosecution to prove the identity of the accused as the person who ran away from the place so as to connect her with the contraband articles seized. Further Ext.D1 will go to show that there are other persons residing in the house and it cannot be said that she is in conscious possession of the article so as to convict the accused for the offence alleged. Further there was no spot sample taken and there is no evidence adduced on the side of the prosecution to prove from where and who had taken the sample etc. and

so the prosecution has failed to prove the link between the accused and the contraband articles seized so as to convict the accused for the offence alleged. The court below has not been considered these aspects and the conviction entered is not proper and she is entitled to get acquittal.

7. On the other hand, the learned Public Prosecutor submitted that the evidence of PWs1 and 3 will go to show that search was conducted and contraband articles seized from the house of the accused. Further, the ration card produced will also shows that she is also residing in the house and the conduct of the accused running away from the place will go to show that it was she who had kept the article there, further the sample was taken from court which was specifically mentioned in the final report. So court below was perfectly justified in convicting the appellant for the offence alleged and no interference is called for.

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

On 15.2.2000, at about 5.45 pm, while PW1 Excise

Inspector attached to Thiruvananthapuram Excise Range along with PW3 Assistant Excise Inspector and others were doing patrol duty, they got information that the accused was engaged in sale of arrack from her house with name Panayil House, Mavalathara in Ulloor Village. Immediately he prepared Ext.P3 search memo and sent the same to Court through an Excise guard and thereafter went to the house of the accused. When they were about 50 feet away from the house, they saw the accused standing outside the house and on seeing the excise party, she went inside the house and then left the house through the rear side of the house. Thereafter they conducted the search of the house in the presence of PW2 and another and found MO1 cannas with three litres of some liquid, on verification he was satisfied that it was arrack. He had also found MO2 mug and MO3 glass in the house which is having the smell of arrack. He seized the same as per Ext.P2 search list in the presence of PW2 and another and thereafter he sealed the cannas and affixed labels on the cannas as well as MOs2 and 3 with the signatures of himself and witnesses and

seized the same as per Ext.P1 mahazar in the presence of PWs2 and 3 and thereafter he came to Excise Office and registered Ext.P4 crime and occurrence report as Crime No.13/2000 of Thiruvananthapuram Excise Range under Section 8(1) of the Abkari Act. He produced the articles before the court along with thondi list. He obtained arrest warrant to arrest the accused and on 22.2.2000, PW3 arrested the accused and prepared Ext.P5 arrest memo and produced her before the court and she was remanded to custody. The investigation in this case was conducted by PW4 the Excise Inspector who questioned the witnesses and recorded their statements. He collected Ext.P6 chemical analysis report and produced the same before court. He completed investigation and submitted final report.

9. PW2 is the independent witnesses to seizure. Though he admitted that he knew the accused and he is the neighbour of the accused, he did not support the case of the prosecution regarding the seizure. He had also admitted that he is a stock witness for the excise official and he had entrusted Ext.D2 summons to the accused which is a

summons received by him in another Abkari case. But that alone is not sufficient to disbelieve the case of the prosecution, especially when PW1 had stated that being an Abkari offence, the neighbouring people will not be willing to become witnesses to the seizure. So they used to take witnesses along with them and conduct the search in their presence. Further it will be seen from the evidence of PWs1 and 3 that they knew the accused as she had involved in other Abkari offence as well. So they have categorically stated that when they got the information regarding the sale of arrack by the accused, they sent search memo and went to the house and at that time she was found standing outside the house and on seeing the Excise party, she ran away from the place. They conducted search and found Mos 1 to 3 and seized the same as per Ext.P2 search list. Thereafter he sealed the cannas and affixed label on the cannas as well as on MOs 2 and 3 and seized the same as per Ext.P1 mahazar. The fact that they knew the accused and she was the accused in other cases is not seriously challenged in cross examination. That shows that the

accused is known to the Excise officials. There is no difficulty for them to identify the accused as the person who ran away from the place as well. Further it is seen from Ext.D1 ration card produced by the accused that she is also residing in the house. Further at the time when they conducted the search, the ration card was found in the house and description of the ration card was also mentioned in the seizure mahazar itself. That shows that she is residing in the house. Further in 313 examination her case was that her husband was a sick person he was bed ridden. So it cannot be said that he may be having domain over the contraband articles seized. The conduct of the accused running away from the house also shows that it was she who had kept the articles in the house. So under the circumstances, the court below was perfectly justified in coming to the conclusion that search and seizure are proper and the identity of the accused as the lady who ran away from the place is also justified and the finding does not call for any interference.

10. Mere seizure of some articles and production of

same before court alone is not sufficient to convict the accused for the offence alleged. In this case it is seen from the documents produced that the search list mahazar and occurrence report reached the court only on 17.2.2000 though the seizure was effected on 15.2.2000 at 5.45 pm. There is no explanation forthcoming that the delay in producing the article. The property list was not seen marked in this case. However it was brought out in the evidence that the articles were produced before the court only on 17.2.2000. The delay in producing the article was not explained. Further in this case there is no spot sample taken. None of the witnesses have spoken in the evidence as to who had taken the sample, from where sample was taken, from where it was sent for chemical examination etc. The thondi clerk who had drawn the sample and sent it for analysis was not examined for the purpose of proving the procedure as well.

11. In the decision reported in **Sasidharan v State of Kerala** [2007 (3) KLT 720], this court has considered the question of drawing sample from court in cases where no

spot sample was taken and the procedure to be followed and such a procedure is not followed then what is the effect of the same and 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 nexuz between the contraband substance and the accused".

12. The same principle was followed in the decision reported in **Nalinakshan v State of Kerala** [2012 (4) KLT 575] as well.

13. Further in the decision reported in **Ravi v State**

of Kerala and Another [2011 (3) KHC 121], this court has held that mere delay in production of article alone is not sufficient to doubt the genuineness of the prosecution case, if the delay has been explained to the satisfaction of the court. But if the delay is not explained then that benefit must be given to the accused. In view of the dictum laid down in the above decision, the non examination of the thondi clerk who had said to have drawn the sample and sent the same for analysis is fatal in this case. Unless he is examined, it cannot be said that the link between the contraband article and the accused have been established by the prosecution and chemical analysis report relates to the representative sample said to have been taken from the contraband articles seized from the possession of the accused so as to convict her for the offence alleged. 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 against the appellant for the offence 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 her giving her the benefit of doubt.

14. In view of the 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 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 her giving her the benefit of doubt. She is set at liberty The bail bond executed by her stand cancelled. 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 order to the concerned court immediately.

Sd/-
K.RAMAKRISHNAN, JUDGE