

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

WEDNESDAY, THE 18TH DAY OF NOVEMBER 2015/27TH KARTHIKA, 1937

CRL.A.No. 1926 of 2004 (A)

AGAINST THE JUDGMENT IN SC 327/2002 of ADDL.SESIONS COURT (ADHOC)-II,
KOZHIKODE DATED 4.11.2004

APPELLANT/ACCUSED::

KOLAVAN, 55 YEARS,S/O. CHATHAN,
PARERUKOTTUMMAL HOUSE, POOLAKODE AMSOM
KOZHIKODE TALUK.

BY ADVS.SRI.TOMY JOHN VETTATH
SRI. GEORGE MATHEW (BY ORDER)

RESPONDENT/COMPLAINANT::

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

BY PUBLIC PROSECUTOR SRI.JIBU P. THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 18-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. RAMAKRISHNAN, J.

.....
Crl.A.No.1926 of 2004
.....

Dated this the 18th day of November, 2015

JUDGMENT

The accused in SC.No.327/2002 on the file of the Additional Sessions Court, Fast Track-II, Kozhikode is the appellant herein. The appellant was charge sheeted by the Excise Inspector, Kunnmangalam excise range in Crime No.12/2000 of that excise range under section 55(a) of the Abkari Act.

2. The case of the prosecution in nutshell was that, on 20.6.2000, at about 11.45 a.m, the accused was found carrying 2 litres of illicit arrack in a 5 litre kannas through the western road margin in front of the house of late Chalikuzhiyil Kuttoosa Haji situated in Nayarkuzhi-Koolimad road in Poolakkode amsom Nayarkuzhi desom of Kozhikode taluk, in violation of the provisions of the Abkari Act and thereafter he had committed the offence punishable under section 55(a) of the Abkari Act (ought to be under section 8(1) of the Act).

3. After investigation, final report was filed before the Judicial First Class Magistrate Court, Kunnamangalam, where it was taken on file as C.P.No.6/2002. After complying with the

formalities, the learned Magistrate committed the case to Sessions Court, Kozhikode under section 209 of the Code of Criminal Procedure (hereinafter referred to as 'the Code'). After committal, the Sessions Court took cognizance of the case as S.C.No.327/2002 and originally made over the case to the Principal Assistant Sessions Court, Kozhikode for disposal. Thereafter the case was withdrawn and made over to the Additional Sessions Court (Adhoc-II), Kozhikode for disposal by the Sessions Judge.

4. When the accused appeared before the court below, after hearing both sides, charge under section 55(a), of the 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, Pws 1 to 5 were examined and Exts.P1 to P9 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 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 he has been taken by the excise official on suspicion and

thereafter he has been falsely implicated in the case. Since 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. His son-in-law was examined as DW1 to prove his case. After considering the evidence on record, the court below found the accused guilty for the offence under section 55(a) of the Abkari Act, convicted him thereunder and sentenced him to undergo rigorous imprisonment for two years and also to pay a fine of Rs.One lakh, in default to undergo simple imprisonment for six months. Set off was allowed for the period of detention already undergone. Aggrieved by the same, the above appeal has been preferred by the appellant/accused before the court below.

5. Heard counsel appearing for the appellant and Sri.Jibu P. Thomas, Public Prosecutor appearing for the State.

6. Counsel for the appellant submitted that independent witnesses to the seizure did not support the seizure. He had also stated that he signed the mahazer from the excise office. Further, court below had not properly appreciated the evidence of DW1 to prove false implication of the accused in the case. So under the circumstances, the court below should not have

relied on the official witnesses alone to convict the accused for the offence alleged. He had further submitted that if for any reason this Court is not inclined to interfere with the conviction, he prayed for leniency as the accused is aged more than 65 years now.

7. On the other hand, learned Public Prosecutor submitted that the court below had properly appreciated the evidence and rightly convicted the appellant for the offence alleged.

8. The case of the prosecution in nutshell was that on 20.6.2000, at about 11.45 a.m, while PW1, the Excise Inspector along with PW2, the excise guard were doing patrol duty and when they reached in front of the house of one deceased Chalikuzhiyil Kuttoosa Haji, they found the accused coming with MO1 can having 5 litres capacity and on seeing the excise party, he tried to go away from place. So he stopped him and examined MO1 cannas and found that it contained two litres of some liquid, which on further examination satisfied that it was arrack. He arrested the accused and prepared Ext.P1 arrest memo and gave arrest intimation to his wife. He took sample of 180 ml liquid from the cannas and sealed the same and affixed label containing the signature of himself, the

accused and the witnesses. He sealed and labeled the kannas also in the same fashion. He seized the same as per Ext.P2 mahazer. Thereafter he came to the excise office along with the accused and produced the contraband articles before PW3, the Excise Inspector, who registered Ext.P4 crime and occurrence report as Cr.No.12/2000 of Kunnamangalam excise range against the accused under section 55(a) of the Abkari Act. He produced the accused before court along with Ext.P5 remand report on the same day. He prepared Ext.P6 property list and produced the contraband articles before court on the same day. He prepared Ext.P7 forwarding note and sent the same to court with a request to send the sample for analysis and the sample was sent from court to chemical examiner's lab and Ext.P8 chemical analysis report obtained. Investigation in this case was conducted by PW5. He questioned the witnesses and recorded their statements. On the basis of his request, the village officer prepared Ext.P9 site plan of the place of occurrence. He collected Ext.P8 chemical analysis report and produced the same before court. He completed the investigation and submitted final report.

9. PW3 is an independent witness to the seizure. He had

admitted that he knew the accused and he admitted the signature in Ext.P2 mahazer. He had also admitted that he was present at the time when the accused was taken to the excise office and he along with the wife of the accused went to the excise office for releasing him on bail. At that time, he happened to sign a paper from the excise office. It will be seen from the evidence of DW1, who is non other than the son-in-law of the accused, that he went to the excise office as informed by this witness Shaji. Though they had a case that he has been falsely implicated in the case, no complaint has been filed regarding the same before any of the authorities. The accused had no case before the Magistrate when he was produced that he has been falsely implicated in the case as well. So it is clear from this and rightly observed by the court below that PW3 as well as DW1 were now trying to help the accused and rightly rejected their evidence and believed the evidence of PW3 only to the extent that he had signed Ext.P2 mahazer and Ext.P1 arrest memo from the place of occurrence.

10. Then the evidence is that of excise officials, PW1- the Preventive Officer and PW2 the excise guard, who accompanied him. PW1 had categorically stated that on that

day, while he was doing patrol duty and when he reached the place of occurrence, they saw the accused coming with MO1 cannas in his hand and on seeing the excise party, he tried to go away from the place. So he stopped him and examined MO1 cannas and found two litres of liquid in the same. He examined the same by smelling and tasting and he was satisfied that it was arrack. He convinced the same to the witnesses as well. Thereafter he arrested the accused, prepared Ext.P1 arrest memo and took sample and sealed the sample bottle and the cannas and affixed label containing the signature of himself, the witnesses and the accused and seized the same as per Ext.P2 seizure mahazr in the presence of PW3 and another. Thereafter he came to the excise office along with the accused and the contraband articles and produced the accused, the contraband articles and the documents before PW4, who registered the crime. The evidence of PW1 was corroborated by the evidence of PW2 on this aspect. Though they were cross examined at length, nothing was brought out to discredit their evidence on this aspect. So under the circumstances, the court below was perfectly justified in coming to the conclusion that the accused was arrested along with MO1 cannas which is said

to have contained two litres of arrack.

11. It is seen from the evidence of PW4 coupled with Ext.P5 remand report that the accused was produced before court on the same day. It is also seen from the evidence of Pw 4 and Ext.P6 property list that articles were produced before court on the same day without delay. Further in Ext.P2 mahazer, specimen impression of the seal used for sealing the article was provided. Further, in Ext.P7 forwarding note also, the same specimen impression seal was provided and that was tallied with the seal seen on the sample bottle, which is evident from Ext.P8 chemical analysis report. So it is clear from this that, the articles seized from the possession of the accused were produced before court in a tamper free condition and chemical analysis report relates to the representative sample said to have been taken from the contraband article seized from the possession of the accused. The evidence of PW1 that article seized was arrack was not challenged in cross examination also. So under the circumstances, court below was perfectly justified in coming to the conclusion that the prosecution has proved beyond reasonable doubt that the accused was found to be in possession of two litres of arrack,

possession of which is an offence punishable under section 8(1) of the Abkari Act after the Amendment Act and rightly convicted the appellant for the offence of possession of arrack, which is prohibited after 3.6.1997, though not under section 8 (1) but under section 55(a) of the Abkari Act and the findings does not call for any interference.

12. Counsel for the appellant submitted that the sentence imposed is harsh and he is aged 51 years at the time of commission of the offence and there is no case for the prosecution that he is a habitual offender. The court below had sentenced the accused to undergo rigorous imprisonment for two years and also to pay a fine of Rs. One lakh, in default to undergo simple imprisonment for six months. Persons who are committing the offence under the Abkari Act were doing the same knowing that what they were doing is an offence ignoring the consequences of their act of selling illegally manufactured arrack and its impact on the innocent persons, who are consuming the same and they are doing the same for their personal gain as well. So such circumstances showing undue leniency in imposing the sentence in such case will only give a wrong signal to the society and that it will cause loss of

confidence for the public in the criminal justice delivery system itself. But, at the same time, court can consider the criminal background of the accused namely, family background, possibility of reformation etc while imposing sentence as mitigating circumstances. In this case, prosecution has no case that he had involved in any other crime of similar nature. He was aged 51 years at the time when the offence was committed and he will be more than 65 years now and by this time, he might have understood its impact. It cannot be said that there is no possibility for reformation for the accused as well. So considering the circumstances, while retaining the fine amount of Rs.One lakh, this Court feels that imposing the substantive sentence of six months simple imprisonment and default sentence of two months simple imprisonment 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 simple imprisonment for six months and also to pay a fine of Rs. One lakh, in default to undergo simple imprisonment for two months. Set off was allowed for the period of detention already

undergone.

In the result, the appeal is allowed in part. The order of conviction passed by the court below under section 55(a) (which ought to be under section 8(1) of the Abkari Act) and sentence of fine of Rs.One lakh imposed are hereby confirmed. But the substantive sentence of two years rigorous imprisonment and default sentence of six months simple imprisonment imposed are set aside and the same is modified as follows:

The appellant is sentenced to undergo simple imprisonment for six months and also to pay a fine of Rs. One lakh, in default to undergo simple imprisonment for two months. Set off was allowed for the period of detention already undergone under section 428 of the Code.

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

Sd/-

K. RAMAKRISHNAN, JUDGE.

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/true copy/

P.S to Judge