

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. 1953 of 2004 ()

**AGAINST THE JUDGMENT IN SC 348/2003 of ADDITIONAL DISTRICT COURT (ADHOC),
PATHANAMTHITTA DATED 05.11.2004**

APPELLANT(S)/ACCUSED:

**THANKAPPAN, S/O AZHAKAN
KARIYILAKUZHAYIL VEEDU, PULINTHANAM MURI
KUNNAMTHANAM VILLAGE.**

BY ADV. SRI.S.SUBHASH CHAND

RESPONDENTS/COMPLAINANT & PUBLIC PROSECUTOR:

**1. STATE OF KERALA REPRESENTED BY
THE SUB INSPECTOR OF POLICE, KEEZHVAIPUR.**

**2. THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.**

BY ADV.SEENA RAMAKRISHNAN, PUBLIC PROSECUTOR

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

K. RAMAKRISHNAN, J.

Crl. Appeal No.1953 of 2004

Dated this the 6th day of November, 2015

JUDGMENT

Accused in S.C.No.348/03 on the file of the Additional District and Sessions (Ad-hoc) Court-I, Pathanamthitta is the appellant herein. The appellant was charge-sheeted by the Sub Inspector of Police, Keezhvaipur in Crime No.189/99 of Keezhvaipur Police Station under Section 8(1) read with 8 (2) of the Abkari Act.

2. The case of the prosecution in nutshell was that on 17.10.1999, at about 5.10 pm, the accused was found to be in possession of 2 litres of arrack near his residential property with name Kariyilakuzhiyil House at Pulimthanam in violation of the provisions of Abkari Act and thereby he had committed the aforesaid offence.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court, Thiruvalla where it was taken on file as C.P.No.96/2002. After complying with the formalities, the learned Magistrate committed the case to Sessions Court, Pathanamthitta under Section 209 of the

Criminal Procedure Code. After committal, Sessions Judge took cognizance of the case as S.C. No.348/03 and thereafter made over to Additional District & Sessions (Ad-hoc) Court-I, Pathanamthitta for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under Section 8(1) and (2) of 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 P8 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 Criminal Procedure 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 is innocent of the same and since he had filed a complaint against Ponnann Bhaskaran, who was engaged in sale of arrack in that locality and since no action was taken and he filed a complaint before the Superintendent of Police regarding the same, on account of that enmity, he has been falsely implicated in the case. Since the evidence in this case did not warrant an acquittal under Section 232 of the

Criminal Procedure 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 8(1) and (2) 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 two years more. Set off was allowed rigorous imprisonment 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. Heard Sri Balachandran Pillai, counsel representing Sir S.Subhash Chand, counsel appearing for the appellant and Smt. Seena Ramakrishnan, the learned Public Prosecutor appearing for the State.

6. The counsel for the appellant submitted that PWs. 1 and 2 did not support the case of the prosecution. Further, though the seizure was effected in the presence of two independent witnesses, they were not even cited as witnesses and they were not examined before court and there is no

explanation forthcoming from the prosecution for non-examination of the those witnesses. So it is not safe to rely on the official witnesses alone to prove the seizure. Further, PWs. 3 and 4 have no prior acquaintance with the accused and that he was not arrested from the spot and PW-3 had stated that he was not shown the accused later during the course of investigation as well. Further, the arrest memo was not produced and the evidence will go to show that the articles seized were not the same articles reached in the court and the chemical analysis report does not relate to the sample said to have been taken from the contraband article alleged to have been seized from the possession of the accused. So the court below was not justified in convicting the appellant for the offence alleged and he is entitled to get acquittal.

7. On the other hand, the learned Public Prosecutor submitted that the evidence of PWs. 3 and 4 will go to show that it was the accused who had abandoned the articles and ran away from the place and they have identified the accused as the person who ran away from the place. There was no delay in producing the article. So the court below was perfectly justified in the convicting the appellant for the offence alleged.

8. The case of the prosecution as emerged from the prosecution witnesses was that on 17.10.1999 at about 5.10 pm while PW-4 Sub Inspector of Police alongwith PW-3 and party were doing patrol duty, they got information that one Thankappan alias Aniyan was conducting sale of arrack from his residential property and immediately they rushed to the spot and saw the accused standing therewith MO-1 kannas and MO-2 glass in his hand. On seeing the police party, he abandoned the same and ran away from the place. Though they chased to him, they could not arrest him. Thereafter, they came back to the place where they articles were abandoned and they verified the contents of the kannas and satisfied that it was arrack. He took sample and sealed the kannas and seized the same as per Ext.P3 mahazar and thereafter came to Police Station and registered Ext.P4 First Information Report as Crime No.189/99 of Keezhvaipur Police Station under Section 8(1) and (2) of Abkari Act. On that day night, when he was doing night patrol duty, at about 9.30 pm, he arrested the accused and came to the Police Station and produced the accused before the court on the next day alongwith Ext.P5 remand report. He prepared Ext.P6 property list and produced the articles before court on the next

day. He sent Ext.P7 requisition for sending sample for analysis and sample was sent from court and Ext.P8 chemical report obtained which shows that the sample contained 30.37% by volume of ethyl alcohol. The investigation in this case was conducted by PW-5, the Circle Inspector of Police who questioned the witnesses and recorded their statement. He completed the investigation and submitted final report.

9. PWs.1 and 2 were examined on the side of the prosecution to prove the alleged seizure of the contraband articles. But they did not support the case of the prosecution though they admitted that they knew the accused. They are not witnesses to Ext.P3 mahazar. No suggestion was given to them that they signed the mahazar as well. So their evidence is not helpful to prove seizure of the contraband articles from the place.

10. PWs. 3 and 4 are the official witnesses to prove the seizure. PW-3 is the accompanying officer and PW-4 is the detecting officer. PW-4 had deposed that while they were doing patrol duty, on that day at about 5.10 pm, they got information that one Thankappan alias Aniyar was engaged in sale of arrack from his property. They have no case that they knew the

accused or has got prior acquaintance of the accused. They only got identification of the accused by name only. It will not be seen from the evidence of PW-4 that they have got prior acquaintance of the accused or he had involved in any other crime of similar nature so as to get acquaintance of him on seeing him. PW-3, the accompanying officer also stated that he did not know the accused and he had no prior acquaintance of the accused. He was seeing the accused for the first time on that day. The evidence of PWs. 3 and 4 will go to show that they have seen the accused at a distance of 75 metres and according to them, on seeing the police party the accused abandoned the articles in his hand and ran away from the place. They have no case that they enquired about the identity of the person and satisfied that the person ran away from the place was the accused. They have no case that apart from PWs. 1 and 2, there were any other persons present there to witness the seizure and they obtained their signature in the seizure mahazar. Quite unfortunately the witnesses to Ext.P3 mahazar namely V.Raj and John Abraham were not even cited as witnesses by the investigating officer in the final report and no attempt was made to trace out them and examine them before the court as well.

That threw suspicion about the seizure said to have been effected by the Police officials.

11. The court below had relied on the decision reported in **Sivaraman v. State of Kerala [1981 KLT SN 17]** (page No.9) for the proposition that even if independent witnesses of seizure did not support the prosecution case, court can rely on the evidence of the official witnesses to prove the seizure. But in this case, the seizure witnesses were not cited as witnesses at all and they were not examined before the court also. So under the circumstances, the dictum laid down in the above decision is not applicable to the facts of the case.

12. Further, PW-3 had categorically stated that after the incident, he was seeing the accused for the first time from court. He had no case that after arrest, he was shown to him and he identified him as the person who ran away from the place. PW-4 also only stated that he was satisfied about the identity of the accused and on that basis he arrested him. What is the basis for his satisfaction is not revealed from his evidence as well. In the absence of evidence to show that they have got prior acquaintance of the accused and they could identify the accused from the spot itself, the identification made by them on later

occasion from court after lapse of time is not safe to rely on for the purpose of proving the identity of the accused as the person who ran away from the place so as to connect him with the contraband articles alleged to have been seized and this aspect has not been properly considered by the court below and that benefit must be given to him.

13. In this case, according to PW-4, he arrested the accused on the same day at 9.30 pm. But he had not produced the arrest memo said to have been prepared at the time of arrest of the accused though the remand report was produced before the court. There is no explanation forthcoming for non-production of the arrest memo as well. Further, the evidence of PWs. 3 and 4 will go to show that after sealing the sample and MO-1 cannas label containing the signature of the witnesses and PW-4 were affixed on them. But, no such thing was mentioned in Ext.P3 seizure mahazar. Further in Ext.P4 property list also, it was not mentioned that it was labelled. The articles were produced before the court on the next day. Further, it was brought out in the evidence of PWs. 3 and 4 that the articles were entrusted to writer for the purpose of production before the court and they were not aware as to who had produced the

same before the court as well. The nature of seal used was not mentioned in Ext.P3 mahazar. The specimen seal impression was not seen affixed in the forwarding note marked as Ext.P7 as well. So under the circumstances, it cannot be said that prosecution was able to establish that the articles alleged to have been seized were the articles reached the court in a tamper free condition and Ext.P8 chemical report relates to the representative samples said to have been taken from the contraband article alleged to have been found to be in possession of the accused and abandoned by him as claimed by the prosecution. These aspects were not considered by the court below before coming to the conclusion that the prosecution has proved beyond reasonable doubt that the accused was found to be in possession of arrack and consequential conviction entered by the court below against the appellant on that basis 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. 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) and 8(2) 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.

**K. RAMAKRISHNAN,
JUDGE**