

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

WEDNESDAY, THE 9TH DAY OF DECEMBER 2015/18TH AGRAHAYANA, 1937

CRL.A.No. 1956 of 2004 (A)

AGAINST THE JUDGMENT IN SC 85/2002 of ASSISTANT SESSIONS COURT,
PATHANAMTHITTA, DATED 30-10-2004.

APPELLANT(S) /ACCUSED:

VISWANADHAN, S/O. NANU,
PUTHUPARAMBIL HOUSE, EDACKANNAM,
THANNITHODE MURI,
THANNITHODE VILLAGE.

BY ADVS.SRI.PHILIP M.VARGHESE
SRI.V.SETHUNATH

RESPONDENT(S) /COMPLAINANT:

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

BY PUBLIC PROSECUTOR SMT. SEENA RAMAKRISHNAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 09-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SS

K. RAMAKRISHNAN, J.

Crl. Appeal No.1956 of 2004

Dated this the 9th day of December, 2015

JUDGMENT

Accused in S.C.No.85/2002 on the file of the Assistant Sessions Judge, Pathanamthitta, is the appellant herein. The appellant was charge-sheeted by the Sub Inspector of Police, Thannithodu police station in Crime No.46/1999 of that police station under Section 8(1) read with Section 8(2) of Abkari Act.

2. The case of the prosecution in nut shell was that, on 14.07.1999 at about 05.30 p.m., the accused was found to be in possession of one liter of arrack in a 1^{1/2} liter bottle with a glass on the southern court yard of Puthuparambil house with No.139/3 of Thannithodu Panchayath situated at Idakannam in Thannithodu Village in violation of the provisions of Abkari Act and thereby he had committed the offence punishable under Section 8(1)

read with Section 8(2) of the Kerala Abkari Act.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court-II, Pathanamthitta, and the case was taken on file as C.P.No.73/1999. Thereafter it was committed to the Sessions Court, Pathanamthitta, by the learned magistrate under Section 209 of the Code of Criminal Procedure (herinafter called the Code). After committal, the Sessions Court, Pathanamthitta had taken cognizance of the case as S.C.No.85/2002 and it was made over to Assistant Sessions Court, Pathanamthitta, for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under Section 8(1) read with Section 8(2) 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 3 were examined and Exts.P1 to P5, MO1, and MO2 were marked on their side. After closure of the

prosecution evidence, the accused was questioned under Section 313 of the Code of Criminal Procedure 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 falsely implicated in the case and he was taken from his house. Since the evidence in the case did not warrant an acquittal under Section 232 of the Code, the accused was called upon to enter on his defence. The thondy clerk was examined as DW1 and Ext.D1 was marked through him. After considering the evidence on record, the court below found the accused guilty under Section 8(1) read with Section 8(2) 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 ₹1,00,000/-, in default to undergo rigorous imprisonment for one year more. Set off was allowed for the period of detention already undergone by him in this case. Aggrieved by the same, the present appeal

has been preferred by the appellant/ accused before the court below.

5. Though the appeal ought to have been filed before the Sessions Court, Pathanamthitta, under Section 374(3)(a) of the Code, as the case was decided by the Assistant Sessions Judge and the sentence was less than seven years, this court has admitted the appeal and sentence was suspended as early as in the year 2004. Returning the appeal on technical ground after long lapse of delay of nearly 11 years, which occurred due to a mistake committed by this court, that should not affect the disposal of the case on merit. Further it cannot be said that this court is having total lack of jurisdiction to entertain an appeal against conviction. So invoking the power under Section 482 of the Code, in order to avoid delay in disposal of the appeal, this court has decided to proceed with the appeal on merit, instead of returning the same to be presented before the proper court, after the lapse of 11

years.

6. Heard Sri.Sethunath, counsel representing the counsel for the appellant and Smt.Seena Ramakrishnan, learned Public Prosecutor appearing for the State.

7. The counsel for the appellant submitted that, no arrest memo or forwarding note has been produced and marked in this case. Further the nature of seal used has not been mentioned in the seizure mahazar and specimen impression of the seal said to have been used for sealing the article has not been produced before the court as well. Further in the absence of production of forwarding note containing the specimen seal impression of the seal said to have been used for sealing the bottle, it cannot be said that there is opportunity for the court to verify the genuineness of the article produced as the same article which has been seized from the possession of the accused. Further though the requisition letter from the court to the chemical examiner's lab is dated 29.10.1999, it reached the chemical

examiner's office on 24.11.1999. There is no explanation for the delay. Further Ext.D1 did not show the date on which the sample was entrusted to the police constable, namely P.C.1025 and there was no delay occurred in the police constable producing the article before the chemical examiner's lab, as that person was not examined as well. So under the circumstances, it cannot be said that the sample reached the chemical examiner's lab in a tamper proof condition and if such thing is not explained, then that benefit must be given to the accused.

8. On the other hand, learned Public Prosecutor submitted that there was no delay in producing the article and the fact that he was arrested from the house compound was not disputed as well. When the thondy clerk was examined on the side of the defence, it can only be presumed that the correct sample was sent to chemical examiners lab and there is no possibility of tampering and the chemical analysis report shows that the seal was in tact

and tallied with the specimen seal provided. So under the circumstances, court below was considered all these aspects and rightly convicted the accused and the finding does not call for any interference.

9. The case of the prosecution as emerged from the prosecution witnesses was that, on 14.07.1999 at about 05.30 p.m., while PW3 the Sub Inspector of Police, Thannithodu police station was doing patrol duty along with PW2 and others, he got information that accused was engaged in sale of arrack from his house compound. Immediately he went to that spot, found the accused standing in the court yard of the house, carrying MO1 bottle and MO2 glass in his hand and on seeing the police party, he tried to go away from that place. So he stopped him and on examination of the bottle which is having a capacity of 1^{1/2} liters, contained one liter of some liquid, which on further examination, he was satisfied that it was arrack. Thereafter he had taken the sample of 175 ml., from that

liquid and sealed the same and labeled the same containing the signature of himself, witnesses and the accused. He sealed MO1 bottle and labeled the same also in the same fashion and affixed label on MO2 glass as well. Thereafter he seized all these articles as per Ext.P1 mahazar in the presence of PW1 and another. He arrested the accused and gave intimation regarding his arrest to his wife. Thereafter he came to police station and registered Ext.P3 first information report as Crime No. 46/1999 of Thannithodu police station against the accused under Section 8(1) read with Section 8(2) of the Abkari Act. He produced the accused before court along with the remand report on the next day and he was remanded to custody. He had produced the articles along with Ext.P4 property list on 15.07.1999 and on the basis of the requisition given by him, the sample was sent from court and Ext.P5 chemical analysis report obtained. He himself had conducted the investigation. He questioned the witnesses and recorded their statements.

He collected Ext.P5 chemical analysis report and submitted final report before court.

10. PW1 is an independent witness to the seizure and arrest of the accused. Though he admitted his signature in Ext.P1, he denied having seen the arrest of the accused or seizure of the contraband article from the possession of the accused. He had denied having stated in Ext.P2 when he was questioned by the investigating officer. But it was brought out in evidence that he knew the accused. So it is clear from this that he was not supporting the case of the prosecution as he wanted to help the accused.

11. Then the evidence available to prove the arrest and seizure is that of PW3, the detecting officer cum investigating officer, and PW2, the police officer, who accompanied him. PW3 had categorically stated that, while he was doing patrol duty on 14.07.1999 at about 5.30 p.m., he got reliable information that the accused was engaged in sale of arrack from his house compound. Immediately he

rushed to the spot and found the accused standing there holding MO1 bottle and MO2 glass in his hand and on seeing the police party he tried to go away from that place. So they stopped him. He examined MO1 bottle having a capacity of 1^{1/2} liters and found that it contained one liter of some liquid, which on further examination he was satisfied that it was arrack. He arrested the accused. He took sample from the liquid in MO1 bottle and sealed and labeled the same and he had sealed and labeled MO1 bottle also and affixed label in MO2 glass and seized the same as per Ext.P1 mahazar. He arrested the accused and gave intimation of arrest to his wife. Thereafter he came to the police station and registered the crime. The evidence of PW3 on these aspect was corroborated by the evidence of PW2. Though they were cross examined at length, nothing was brought out to discredit their evidence on this aspect. Merely because the arrest memo was not produced, especially when the articles were reached the court in time

without delay alone is not a ground to disbelieve the case of the prosecution regarding arrest of the accused and seizure of some bottle with some liquid. Further he had not adduced any evidence to prove false implication or any enmity for the police officials to falsely implicate him in a case like this. So under the circumstances, court below was perfectly justified in relying on the evidence of PWs 2 and 3/ official witnesses alone and coming to the conclusion that the accused was arrested by PW3 along with a bottle containing one liter of some liquid said to be arrack.

12. Mere arrest of the accused along with some liquid alone is not sufficient to convict the accused for the offence alleged. It must be further proved by the prosecution that, the articles reached the court in a tamper proof condition and it reached the chemical examiner's lab also in the same condition in which it was produced in court and the chemical analysis report relates to the representative sample said to have been taken from the

contraband article alleged to have been seized from the possession of the accused. Unless this is established by the prosecution, it cannot be said that, they were succeeded in bringing home the complicity of the accused with commission of the crime. This was so held in the decision reported in **Sasidharan v. State of Kerala (2007(1) KLT 720)**, relying on the decisions reported in **State of Rajasthan V. Daulat Ram (AIR 1980 (SC) 1314)** and **Valsala v. State of Kerala [1993(2) KLT 550 (SC)]**.

13. In those decisions it has been held that, if the sample has changed through several hands before reaching the chemical examiner's lab, unless it is proved by the prosecution by examining those persons, it cannot be said that it has reached the hands of the chemical examiner in a tamper proof condition so as to come to the conclusion that the sample relates to the representative sample of the article alleged to have been seized from the possession of the accused. In this case, it is seen from Ext.P5 chemical

analysis report that, though the covering letter of the Judicial First Class Magistrate Court-II, Pathanamthitta, was dated 29.10.1999, it reached the chemical examiner's lab only on 24.11.1999 and that was sent through one police constable with No.1025. DW1 the thondy clerk was examined and Ext.D1 the relevant page of the thondy register was marked through him. In Ext.D1 though there was an endorsement made by the police constable with No.1025 had received the sample for taking the same to chemical examiner's lab, Thiruvananthapuram, the date of receipt of the same was not mentioned. DW1 was also not in a position to mention the date on which it was entrusted to the police constable as well. In the absence of such evidence, it can only be presumed that it was entrusted on the same day, which appears in the covering letter namely 24.10.1999 and it cannot be presumed as observed by the court below that there was a possibility of the same being given on a subsequent date. Though the covering letter was

prepared earlier. This can be explained only by examining the police constable namely P.C.1025 who had taken the sample from the court and entrusted the same with the chemical examiner's lab. The evidence of PW3 will go to show that he was not aware of the fact as to whether such a police constable was working in that police station at the relevant time. Unless it is proved by the prosecution that the article reached the chemical examiner's lab without any tampering or in a tamper proof condition and explaining the delay in producing the same by examining the said police constable through whom it was forwarded to the lab, it cannot be said that the prosecution has proved beyond reasonable doubt that the sample reached the chemical examiner's lab in a tamper proof condition and the report relates to the representative sample said to have been taken from the contraband article alleged to have been seized from the possession of the accused. This benefit must be given to the accused.

14. In this case the forwarding note has not been marked. The evidence of PW3 will go to show that he had only mentioned that a metal seal was used for sealing the sample and that is in the police station. He had further stated that he had not forwarded the specimen seal impression of the metal seal to any of the authorities. Unless the specimen seal impression of the seal used for sealing the article has been produced before the court, the court will not be getting opportunity to verify as to whether the article reached the court in a tamper proof condition. In this case the forwarding note was also not produced and marked.

15. In the decision reported in **Joseph v. State of Kerala (2009(4) KHC 537)**, it has been observed that non-production of the forwarding note or marking the same is fatal and in the absence of that, it cannot be said that it was on the basis of the request made by the investigating officer that the sample was sent for chemical examiner's

lab. Same view has been reiterated in the decision reported in **Majeedkutty v. The Excise Inspector, Kollam Range (2015 (1) KLD 262)**. This fact was not explained by DW1 also. So under the circumstances, merely because in Ext.P5 it was mentioned that the seal on the bottle was in tact and found tallied with the sample seal provided, no inference can be drawn without the specimen seal provided in court, that the actual seal used for sealing sample was found on the bottle which the chemical examiner had the opportunity to verify to satisfy regarding the genuineness of the sample produced. So under the circumstances and in view of the dictum laid down in the above decision, it cannot be said that prosecution has proved beyond reasonable doubt that Ext.P5 chemical analysis report relates to the representative sample said to have been taken from the contraband article alleged to have been seized from the possession of the accused so as to convict him for the offence of possession of arrack and that benefit must be

given to the accused. The court below has not properly appreciated these aspects in the right perspective on the basis of the precedents, but simply presumed that the letter would have been prepared earlier and it would have been sent through the police constable later and condoned the delay in producing the article before the chemical examiner without any evidence available in this regard and consequential conviction entered by the court below 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 the finding that, the appellant is entitled to get acquittal and 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) read with Section 8(2) of the Abkari Act are

hereby set aside and the 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 fine amount if any remitted by the appellant before the court below is directed to be refunded to the appellant on making necessary application for that purpose before that court.

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

Sd/-
K. Ramakrishnan, Judge

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P.A. to Judge