

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

FRIDAY, THE 11TH DAY OF DECEMBER 2015/20TH AGRAHAYANA, 1937

CRL.A.No. 1982 of 2004 (A)

**AGAINST THE JUDGMENT IN SC 669/2002 of ADDL.DISTRICT COURT (ADHOC)-II,
ALAPPUZHA DATED 06-11-2004**

APPELLANT(S)/ACCUSED::

**CHANDRAN, S/O NARAYANAN
THENNADI KIZHAKKETHIL VEEDU, THRIPPERMTTHURA VILLAGE
MAVELIKARA TALUK, ALAPPUZHA.**

**BY ADVS.SRI.JOHN BRITTO
SRI.C.A.RAJEEV**

RESPONDENT(S)/COMPLAINANT::

**STATE OF KERALA
REPRESENTED BY THE EXCISE INSPECTOR OF
MAVELIKARA RANGE THROUGH THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.**

BY PUBLIC PROSECUTOR SMT SEENA RAMAKRISHNAN

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 11-12-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

LSN

K.RAMAKRISHNAN, J.

Crl.Appeal. No.1982 of 2004

Dated this the 11th day of December, 2015

JUDGMENT

Accused in SC 669/02 on the file of the Additional Sessions Court (Adhoc-II), Alappuzha is the appellant herein. The appellant was charge sheeted by the Excise Inspector, Mavelikkara Excise Range in Crime No. 4/01 of that Excise Range under Section 8(1) and (2) and 55(a) of the Abkari Act.

2. The case of the prosecution in nut shell was that on 19.01.2001 at about 6.15 p.m the accused was found to be in possession of 1 litre of arrack near the house of one Yohannan in Oripam muri of Thriperumthura village in violation of the provisions of the Abkari act and thereby he had committed the offence punishable under Section 8(1) and (2) and 55(a) of the Abakri Act.

3. After investigation final report was filed before the Judicial First Class Magistrate Court-II, Chengannur where it was taken on file as CP 123/01. After complying with the formalities, the learned Magistrate committed

the case to the Sessions Court, Alappuzha under Section 209 of the Code of Criminal Procedure (hereinafter referred to as 'the Code'). After committal, the Sessions Court took cognisance of the case as SC 669/02 and made over to Additional Sessions Court (Adhoc-II), Alappuzha for disposal.

4. When the accused appeared before the court below after hearing both sides, charge under Section 55 (a) of the Abkari Act was framed (which ought to be under Section 8(1) r/w 8(2) of the Abkari Act after the amendment) 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 P4 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 no article was seized from his possession and he has been falsely implicated in the case. Since the evidence in the case warranted acquittal under Section 232 of the Code,

the accused was called upon and enter on his defence. But no defence evidence was adduced on his side. After considering the evidence on record, the court below found him guilty under Section 55(a) of the Abakri Act, convicted thereunder and sentenced him to undergo rigorous imprisonment for one year and also to pay a fine of Rs. 1,00,000/- in default to undergo rigorous imprisonment for three months more. Aggrieved by the same, the present appeal has preferred by the appellant/accused before the court below.

5. Heard Sri. John Britto, the learned counsel appearing for the appellant and Smt.Seena Ramakrishnan, Public Prosecutor appearing for the State.

6. Counsel for the appellant submitted the independent witness to seizure did not support the case of the prosecution. Further, the evidence of PWs 1 and 5 will go to show that 150 ml arrack was taken as sample in 180 ml bottle. But it will be seen from Ext.P4 chemical analysis report what was examined is 180 ml liquid. So it cannot be said that 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. The witnesses examined is not competent to prove the mistake. They ought to have examined the chemical examiner who alone is competent to explain if it is a mistake and in the absence of such evidence, that benefit must be given to accused.

7. So he prayed for acquittal of the accused. On the other hand, the learned Public Prosecutor submitted the evidence adduced on the said prosecution will go to show that the accused was arrested along with arrack and the evidence of PW5 will go to show that what is written in the chemical analysis report is only a mistake especially when other descriptions fully tally with the descriptions mentioned. Further in the property list also it was specifically mentioned that 150ml liquid in 180 ml bottle was taken as sample. So, under the circumstances, court below has explained the same and there is nothing to disbelieve the case of the prosecution and no interference is called for.

8. The case of the prosecution as emerged from the prosecution witnesses was as follows:- On 19.01.2001,

at about 6.15 p.m PW5, the Preventive Officer attached to Mavelikkara Excise Range was doing patrol duty along with PW1, the Excise Guards and others and when they reached the place of occurrence, they saw the accused coming with MOI bottle having a capacity of 1 ½ litres and on seeing the Excise party, he tried to go away from that place. So he stopped him and examined the contents of the bottle and satisfied that it contained 1 litre of arrack. So he arrested the accused and took 180 ml liquid from the liquid in MO I bottle in a 180 ml bottle and sealed the same and affixed label containing the signature of himself and accused and the witnesses and also sealed and labelled the bottle also in the same fashion and seized the same as per Ext.P1 mahazar in the presence of Ext.PW2 and another. He arrested the accused and came to Excise Office and produced the accused and the contraband articles seized before PW3, the Excise Inspector, who on the basis of the documents registered Ext.P2 occurrence report as Crime No.4/01 of Mavelikara Excise Range under Section 8(1) and (2) of the Abkari Act. He prepared Ext.P3 property list and

produced the articles before court on next day along with property list. He produced the accused also along with remand report on the next day. The investigation in this case was conducted by PW4. He questioned the witnesses and record their statements. He collected Ext.P4 chemical analysis report and produced the same before court. He complete the investigation and submitted final report.

9. PW2 is an independent witness to the seizure. Though he admitted his signature in Ext.P1, he denied having seen the arrest and seizure of any article from the possession of the accused. But he had stated that he knew the accused. So it is clear from the evidence that he was trying to help the accused and that was the reason why he was not supporting the case of the prosecution.

10. Then the evidence available is that of PW5, the detecting officer and PW1, the Excise Guard who accompanied him. PW5 has stated that on 19.1.2001 at about 6.15 p.m, when he reached the place of occurrence, he saw the accused coming with MO I bottle. So they

stopped him. On examination, he was satisfied that it contained 1 litre of arrack. So he arrested him. He took sample and sealed and labeled the sample bottle and also sealed and labelled the MO I bottle in the same fashion and seized the same as per Ext.P1 mahazar in the presence of PW2 and another. He arrested the accused and prepared arrest memo and thereafter produced the accused and the contraband articles seized along with the documents before PW3, the Excise Inspector of Mavelikkara Excise Range. The evidence of PW5 on this aspect was corroborated by the evidence of PW1, the Excise Guard. Though they were cross-examined at length, nothing was brought out to discredit their evidence on this aspect. So under the circumstances, court below was perfectly justified in coming to the conclusion that prosecution had proved beyond the reasonable doubt that the accused was arrested by PW5 along with 1 litre of some liquid found in MO I bottle said to be arrack.

11. Mere arrest of the accused along with seizure of 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 and chemical examiners lab in a tamper proof condition and the chemical analysis report relates to the representative samples said to have been taken from the contraband article alleged to have been seized from the possession of the accused. It is true that the articles were produced before the court on the next day itself without delay which is evidenced from the evidence of PW3 and Ext.P3 property list. It is also clear from Exts.P1 seizure mahazar and P3 property list, that the quantity of sample taken was 150 ml in a 180 ml bottle, this was reiterated by PW5 as well as PW1 also in their evidence. But it is seen in Ext.P4, the chemical analysis report, that what was examined in the lab was a bottle contained 180ml of clear liquid. It is true that PW5 had stated that it could be a mistake and court below also came to the conclusion that the quantity mentioned in Ext.P4 would be a mistake. But if there is a mistake in the quantity of article examined by the chemical examiner and that is likely to affect the right of the party, who is entitled to rely on that

mistake, it is not proper for the court to rely on the evidence of the witnesses who were not responsible for the mistake in the report. The prosecution when it was pointed out ought to have examined the chemical examiner to prove that the quantity mentioned in Ext.P4 is only mistake and what was received by them is 150 ml liquid in 180 ml bottle. But such an attempt was not made in this case.

12. Further the specimen impression of the seal used for sealing the article was not produced. Even PW3 had not stated that he had collected the specimen seal impression and produced the same before court. He had no case when he was examined that he had sent any forwarding note with the request to send the sample as well for chemical analysis. It is not known on whose request the sample was sent for analysis. These aspects has to be considered before coming to the conclusion that the sample reached the chemical analysis lab in a tamper proof condition and the chemical analysis reports relates to the sample said to have been taken from the contraband article. This was so held in the decision

reported in **Sasidharan v. State of Kerala, [2007(1) KLT 720]** and **Joseph v. State of Kerala, [2009(2) KHC 567]** and **Krishnan v. State of Kerala, [2015(1) KLT 822]**. In the absence of production or marking of forwarding note with specimen seal impression, it cannot be said that the chemical analysis report relates to the representative sample said to have been taken from the possession of the accused so as to come to a conclusion that the prosecution has proved the case against the accused beyond reasonable doubt. Further it is seen from Ext.P4 that though the letter was dated 06.02.2001, it reached the chemical examiners lab on 07.02.2001. The person who had taken the sample was not examined so as to prove that he had produced the article before the chemical examiners lab in the same condition in which was received by him from court as well. This aspect were not properly considered by the court below, before coming to the conclusion that the prosecution has proved the case beyond reasonable doubt and as such the conviction entered on that premises is unsustainable in law and the same is liable to be set aside. So the

appellant is entitled to the acquittal of the charge levelled against him giving him the benefit of doubt.

13. In view of finding that the appellant is entitled to the acquittal, 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 sentenced passed by the court below against the appellant under Section 55(a) of the Abkari Act (which ought be under Section 8(1) of the Abkari Act) are hereby set aside. The appellant is acquitted of the charge levelled against him giving him benefit of doubt. He is set at liberty. The bail bond executed by him stands cancelled. The court below is directed to refund the fine amount if any remitted by the appellant to him on making necessary application before that court for that purpose.

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

Sd/-K.RAMAKRISHNAN,
Judge
True Copy

P.A to Judge