

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

THURSDAY, THE 17TH DAY OF SEPTEMBER 2015/26TH BHADRA, 1937

CRL.A.No. 1695 of 2005

**S.C.NO.645/2001 OF ADDITIONAL DISTRICT & SESSIONS COURT (ADHOC)-II,
KOLLAM**

C.P.NO.121/1999 OF JUDICIAL FIRST CLASS MAGISTRATE COURT, KOLLAM

CRIME NO.368/99 OF KUNDARA POLICE STATION

APPELLANT(S)/(ACCUSED) :

**JOY, S/O.ALOCIOUS,
REEJA BHAVAN, NORTH OF KAVERI JUNCTION, KAITHAKODI,
CHERUMOOD CHERRY, PERINAD VILLAGE, KOLLAM DISTRICT.**

**BY ADVS.SRI.S.SUNDARESAN (THACHODU)
SRI.M.R.RAJESH**

RESPONDENT(S)/(COMPLAINANT) :

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

BY PUBLIC PROSECUTOR SRI.SEENA RAMAKRISHNAN

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 17-09-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

Msd.

K.RAMAKRISHNAN, J.

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Crl. Appeal No.1695 OF 2005

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Dated this the 17th day of September, 2015

JUDGMENT

The accused in SC.No.645/2001 on the file of the Additional Sessions Court (Adhoc-2) Kollam is the appellant herein. The appellant was charge sheeted by the Assistant Sub Inspector of Police Kundara in Crime No.368/1999 of Kundara Police Station under Section 55(a) and (i) of the Abkari Act.

2. The case of the prosecution in nutshell was that on 15.7.1999, at about 5.30 pm, the accused was found to be in possession of 8 litres of arrack intended for sale and stored on the north-western corner of the property in which his residential building 'Reeja Bhavan' is situated in Perinad village in violation of the provisions of the Abkari Act and thereby he had committed offences punishable under Section 55(a) and (i) of the Abkari Act.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court-I, Kollam where it

was taken on file as CP No.121/1999. Thereafter the case was committed to Sessions Court Kollam by the learned Magistrate 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 SC.No.645/2001 and made over to Additional Assistant Sessions Court Kollam for trial and disposal. Thereafter it was withdrawn by the Sessions Judge and made over to Additional Sessions Court (Adhoc-2) Kollam for disposal.

4. When the accused appeared before the court below, after hearing both sides charge under Section 55(a) and (i) of the Abkari Act (it ought to have been 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 4 were examined and Exts.P1 to P4 and MO1 were marked on the side of the prosecution. After closure of the prosecution evidence, the accused was questioned under 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 is innocent of the same and he has been falsely implicated in the case. Since evidence in the case did not warranted an acquittal under Section 232 of the Code, the accused was called upon to enter on his defence, but except marking Exts.D1 and D2 no other evidence was adduced on his side. After considering the evidence on record, the court below found the appellant is not guilty for the offence under Section 55 (i) of Abkari Act and acquitted under charge under Section 235(1) of the Code, but found guilty under Section 55(a) of Abkari Act and convicted him thereunder and sentenced him to undergo rigorous imprisonment for 2 years and also to pay a fine of Rs.1,00,000/- and in default to undergo rigorous imprisonment for one year more. Set off was allowed for a period of detention already undergone by him 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 Sri. M.R. Rajesh counsel appearing for the

appellant and Smt. Seena Ramakrishnan learned Public Prosecutor appearing for the State.

6. The counsel submitted that the investigation was conducted by an Assistant Sub Inspector of Police who is not an Abkari Officer and as such the investigation is vitiated and consequential cognizance taken on the basis of that final report is also nonest in law and the lower court was not justified in holding that investigation conducted by the Assistant Sub Inspector of Police is valid. He had relied on the decision reported in Subhash v State of Kerala [2008 (2) KLT 1047] in support of his case. He had also argued that though the article was seized on 15.7.1999 it reached the court only on 21.7.1999. There is no explanation forthcoming for the delay. It is true that mere delay alone is not sufficient to disbelieve the case. But if it is not explained then that is fatal according to the counsel for the appellant. He had relied on the decision reported in Ravi v State of Kerala and Others [2011 (3) KHC 121] in support of his case. According to him court below was not justified in convicting the offence alleged. He is entitled to get

acquittal.

7. On the other hand learned Public Prosecutor submitted that the Assistant Sub Inspector of Police is also competent to conduct investigation as he is vested with the powers of the Sub Inspector under the Code and also by virtue of the notification issued by the Government. Further the delay has been properly explained. So under the circumstances the court below had considered all these aspects and rightly convicted the accused for the offence alleged.

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

On 15.7.1999, at about 5.30 pm, while PW3 was doing patrol duty along with PW2, he got information that the accused was selling arrack and so he immediately went to that place and found the accused carrying a kannas and on seeing the police jeep he tried to go away from that place. So they stopped him and when he questioned, he disclosed his identity as Joy, S/o of Kochalotious. So he verified the contents of the kannas and found that it contained 8 litres

of liquor. Further on further examination of contents of the kannas, they were satisfied that it was arrack. So he arrested the accused. Thereafter he took sample and sealed the sample bottle and labelled the same with label containing the signatures of himself and accused and witnesses and sealed and labelled MO1 kannas also in the same fashion and seized the same as per Ext.P1 mahazar in the presence of PWs 1 and another. Thereafter he came to Police Station and registered Ext.P2 First Information Report as Crime No.368/1991 of Kundara Police Station under Section 55 (a) and (i) of the Abkari Act against the accused. He had sent the articles to court along with Ext.P3 property list with requisition to send the sample for analysis and it was sent from court and Ext.P4 report obtained which shows that it contained 26.62% volume of ethyl alcohol. The investigation was conducted by PW4, the Assistant Sub Inspector of Police. He questioned the witnesses and recorded the statement and completed the investigation and filed final report.

9. PW1 is the independent witnesses to the seizure.

Though earlier he had denied having seen the incident and signing the mahazar, when he was confronted with the mahazar, he admitted the signature and he had also admitted that he knew the accused. So it is clear from the evidence that he is now trying to help the accused and that was the reason why he is not supporting the case of the prosecution.

10. Then the evidence is that of PWs 2 and 3 to prove the seizure. PW3 is the Sub Inspector of Police and PW2 is the Police Constable attached to the same police station who was in the patrol party at the relevant time. PW3 had categorically stated that while they were doing patrol duty, they got reliable information that arrack was being sold from behind the house by name 'Reji Bhavan' and immediately they went to the spot and saw the accused holding MO1 cannas in his hand. On seeing the police party, he tried to go away from the place and so they stopped him. When they questioned, he disclosed his identity as Joy, S/O Koch Allotious. Thereafter on verification of MO1 cannas, it contained 7 litres of liquor

and on further examination it was revealed that it was arrack. So he arrested the accused and took sample from the liquid and sealed the same and labelled the same with the signature of the accused and witnesses and himself and he sealed and labelled the kannas also in the same fashion. Thereafter he seized the same as per Ext.P1 mahazar and came back to the police station and registered the crime. The evidence of PW3 on this 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. It is settled law that merely because independent witness to the seizure did not support the case of the prosecution regarding seizure, it is not sufficient to disbelieve the case of seizure and court can rely on the evidence of the official witnesses if it is satisfied with its trustworthiness. In this case nothing was brought out to discredit the evidence of PWs 2 and 3 on this aspect. So the 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 MO1 kannas with some liquor in the same.

11. Merely because it was proved by the prosecution that the accused was arrested with MO1 kannas alone is not sufficient to convict him for the offence alleged. It must be proved by the prosecution that they have produced the articles before the court in a tamper proof condition and the chemical analysis report relates to such sample. In this case the property list shows that it reached the court on 21.7.1999 though seizure was on 15.7.1999. The explanation given was that though it was produced on the same day it was returned by the Thondi Clerk and that was the reason for the delay. The court below had believed the same though it has observed in the judgment that he has got a duty to get endorsement of the Thondi Clerk itself and wanted to inform the Chief Judicial Magistrate about the conduct of the staff in this regard.

12. But except the interested testimony of PW3, on this aspect, there was no acceptable evidence adduced on the side of the prosecution to prove this fact. Further PWs 2 and 3 have no case after the seizure as to who was in

possession of the article as well. They were not aware of the fact as to who had produced the article before the court as well. There is no explanation forthcoming from the side of the prosecution for the delay of 6 days in producing the article. It is true that mere delay in producing the article is not sufficient to disbelieve the genuineness of the article produced in court. If it is explained by the prosecution then to the satisfaction of the court, then court can ignore the delay but if it is not explained then that benefit must be given to the accused. This was so held in the decision reported in Ravi v State of Kerala [2011 (3) KHC 121].

13. So it cannot be said that the prosecution has proved beyond the reasonable doubt that the articles were produced before the court in a tamper proof condition so as to come to the conclusion that the same article which was seized was the article produced before the Court and Ext.P4 chemical analysis report related to representative sample said to have been taken from the contraband articles alleged to have been seized from the possession of the accused and that benefit must be given to the accused. So the reasoning

given by the court below against the documentary evidence which ought to have been obtained merely relying on the oral testimony and not supported by the documentary evidence on this aspect is unsustainable by law and that benefit must be given to the accused.

14. In this case the investigation was conducted by Assistant Sub Inspector of Police and who is not an Abkari Officer and covered by the notifications issued by the Government vesting with the power of investigation in Abkari Cases. Court below had relied on several decisions and came to the conclusion that Assistant Sub Inspector of Police is also competent to conduct investigation and on that ground the accused was not entitled to get acquittal. But this aspect was considered by the Division Bench of this court in Subhash v State of Kerala [2008 (2) KLT 1047] and declared that a Magistrate cannot take cognizance of the offence under the Act on the basis of the final report filed by Assistant Inspector of Police who is not an Abkari Officer as defined under the Act. Illegality and irregularity of investigation is different from lack of power to initiate the

prosecution. This court has over ruled by the decision reported in Vikraman v State of Kerala [2007 (1) KLT 1010 and affirmed the dictum laid in Subash v State of Kerala [2007 (4) KLT 169]. This court has relied on several decisions of this court including the decision relied on by the court below and then came to the conclusion that the investigation conducted by the Assistant Sub Inspector of who is not an Abkari Officer is nonest in the eye of law and that irregularity cannot be cured and cognizance taken on the basis of that report is illegal and consequential trial and conviction entered is also not proper and in that case allowed the appeal and acquitted the accused. So under the circumstances, the finding of the court below that the prosecution has proved beyond reasonable doubt that the accused had committed offence under Section 55(a) of Abkari Act based on final report filed by an incompetent officer lacks power to conduct investigation and submitted final report is illegal. So the order of conviction and sentence passed by the court below are set aside. Since then the court has found that the delay in producing the

article is fatal and is entitled to get acquittal on that ground, this court feels that instead of discharging the accused, he has to be acquitted. So the accused is acquitted giving him the benefit of doubt. Since the appellant is entitled to get acquittal, the fine 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 imposed by the court below against the appellant are set aside. The appellant is acquitted of the charge leveled against him by 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 is directed to be returned to him on making necessary application by the appellant for that purpose.

Office is directed to communicate this order to the concerned court immediately.

Sd/-

K.RAMAKRISHNAN, JUDGE

SKV