

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

THURSDAY, THE 8TH DAY OF OCTOBER 2015/16TH ASWINA, 1937

CRL.A.No. 1721 of 2005 ()

AGAINST THE JUDGMENT IN SC 376/2001 of ADDL.DISTRICT COURT (ADHOC),
MAVELIKKARA DATED 05-09-2005

AGAINST THE ORDER IN CP 21/2001 of J.M.F.C.-I, MAVELIKKARA

APPELLANT/ACCUSED: :

RAJAN, S/O. AYYAPPAN,
KURAVARAYYATHU VEEDU, MUDIYOORKONAM MURI
PANTHALAM VILLAGE, ADOOR TALUK
PATHANAMTHITTA DISTRICT.

BY ADVS. SRI.M.K.HARIKUMAR
ADV.V.SETHUKUTTY AMMA (LEGAL AID COUNSEL)

RESPONDENTS/COMPLAINANTS: :

1. THE EXCISE INSPECTOR
MAVELIKKARA RANGE.

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

BY P.P.SMT. SEENA RAMAKRISHNAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 08-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. RAMAKRISHNAN, J.

.....
Crl.A.No.1721 of 2005
.....

Dated this the 8th day of October, 2015.

JUDGMENT

The accused in SC.No.376/2001 on the file of the Additional Sessions Court (Adhoc), Mavelikkara is the appellant herein.

2. The appellant was charge sheeted by the Excise Inspector, Mavelikkara in Crime No.102/1997 of Mavelikkara Excise Range under sections 8 and 55(a) of the Abkari Act.

3. The case of the prosecution in nutshell was that on 29.8.1997 at about 5.30 p.m, the accused was found to be in possession of 8 litres of illicit arrack and found transiting the same on the eastern side of Iranikkuzhi old bridge along Mavelikkara – Panthalam road in violation of the provisions of the Abkari Act and thereby he had committed the offence punishable under sections 8 and 55(a) of the Abkari Act.

4. After investigation, final report was filed before the Judicial First Class Magistrate Court, Mavelikkara where it was taken on file as C.P.No.21/2001. Thereafter it was committed to the Sessions Court, Alappuzha by the learned Magistrate under

section 209 of the Code of Criminal Procedure (hereinafter referred to as 'the Code'). After committal, the case was taken on file by the Sessions Court, Alappuzha as S.C.No.376/2001 and it was originally made over to the Additional Sessions Court (Adhoc), Mavelikkara for disposal. Thereafter, when the Additional Sessions Court (Adhoc) was formed, it was withdrawn and made over to that court for disposal.

5. When the accused appeared before the court below, after hearing both sides, charge under sections 8 and 55(a) 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 P5, 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 is innocent of the same and he has been falsely implicated in the case. One Sahadevan Pillai was in enmical terms with him and at the instigation of said

Sahadevan Pillai, he has been falsely implicated in the case. Since the 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. One Manoharan Pillai was examined as DW1 on the side of the defence. After considering the evidence on record, the court below found the appellant guilty under sections 8 and 55(a) of the Abkari Act and convicted him thereunder and sentenced him to undergo rigorous imprisonment for a period of three years and also to pay a fine of Rs. One lakh, in default to undergo rigorous imprisonment for one year. Set off was allowed for the period of detention already undergone by him. Aggrieved by the same, the present appeal has been preferred by the appellant/accused before the court below.

6. Since counsel appearing for the appellant did not appear, this Court appointed Smt. Sethukutti Amma, as legal aid counsel. Heard legal aid counsel and Smt. Seenaraamakrishnan, Public Prosecutor appearing for the State.

7. The legal aid counsel argued that, in this case the evidence will go to show that the incident occurred not within

the jurisdiction of Mavelikkara excise range and so the detection is not proper. Further the investigating officer in this case has not been examined which has caused prejudice to the accused. Further the independent witnesses to the seizure did not support the case of the prosecution. So the court below was not justified in convicting the appellant for the offences alleged. Further the legal aid counsel argued that if for any reason, this Court is not inclined to interfere with the conviction, she prayed for leniency.

8. On the other hand, learned Public Prosecutor submitted that evidence of Pw1 coupled with the evidence of PWs 2 and 3 admitted the signature in Ext.P1 and the evidence of PW4, the excise inspector will go to show that the article was seized from the possession of the accused and there was no delay in producing the article. So the court below was perfectly justified in convicting the appellant.

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

On 29.8.1997 at about 5.30 p.m, PW4, the Excise Inspector, Mavelikkara excise range was doing patrol duty along

with PW1, the Preventive Officer and when they 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 escape from the scene and they stopped him and PW4 examined the cannas and satisfied that it was arrack and it was having 8 litres of quantity. He had taken sample in a 375 bottle and sealed the same and labelled the same. He had sealed the cannas and labelled the same also in the same fashion. The labels contained the signature of the accused, himself and the witnesses. Thereafter, he arrested the accused and seized the articles as per Ext.P1 mahazer in the presence of witnesses. He came to the excise office and registered Ext.P3 crime and occurrence report as Crime No.102/1997 of Mavelikkara Excise Range against the accused under sections 8 and 55(a) of the Abkari Act. He produced the accused along with Ext.P2 property list on the next day. He gave requisition for sending the samples for analysis. Accordingly sample was sent for analysis and Ext.P4 chemical analysis report obtained which shows that the sample contained 33.99% by volume of ethyl alcohol. Investigation in the case was conducted by CW7, who

questioned the witnesses, recorded their statements, completed the investigation and submitted final report.

10. Pws 2 and 3 are attestors to Ext.P1 mahazer. Though they admitted their signatures in Ext.P1, they denied having seen the seizure. But both of them had stated that they knew the accused. So it is clear from this that these witnesses are now trying to help the accused and that was the reason why they are not supporting the case of the prosecution.

11. Then the evidence available is that of Pw1, the Preventive Officer, who accompanied PW4, the Excise Inspector. PW4 had categorically stated that he along with PW1 was doing patrol duty along Mavelikkara Panthalam road and when they reached on the western side of Iranikkuzhi old bridge, they saw the accused coming with MO1 kannas in his hand. On seeing the excise party, he tried to escape from the place. So they stopped him and on examination of the kannas they found that it contained 8 litres of some liquid which on further examination by smelling and tasting, he was satisfied that it was arrack. He convinced the same to the witnesses as well. Thereafter he arrested the accused, took sample, sealed sample

bottle and affixed label and sealed and labelled the cannases and seized as per Ext.P1 mahazer and thereafter came to the excise office and registered the case. He also stated that he produced the articles without delay. The evidence of PW4 was corroborated by the evidence of PW1, the Preventive Officer. Though they were examined at length, nothing was brought out to discredit their evidence in this regard. Though an attempt was made to show that place of occurrence was not within the jurisdiction of Mavelikkara excise range, that attempt did not succeed as PW1 had categorically stated that, that place is within the jurisdiction of Mavelikkara excise range and Pathanamthitta district is on the eastern side of the bridge and on the western side of the bridge falls within the jurisdiction of Mavelikkara excise range and it was from the western side of the bridge that the detection was made. So the submission made by the legal aid counsel that PW4 had no jurisdiction over the area where the detection was made is without any substance.

12. There were two independent witnesses apart from the attesor to seizure mahazer. But they could not be examined

as they were no more. Further investigating officer in this case could not be examined as he was completely bedridden and he was not in a position to give evidence. So non examination of the investigating officer is not fatal in this case as it was not deliberate. Further there is nothing brought out in the evidence of Pws 1 and 4 regarding the detection. Unless it is proved by the defence that non examination of the investigating officer had caused any prejudice to them, it is not fatal and it cannot be a ground for acquittal. This was so held in the decision reported in ***Bihari Prasad v. State of Bihar*** (AIR 1996 SC 2905) and ***Hakru v. Rajasthan***(1994 Crl.LJ 2141). So in the absence of any evidence adduced on the side of the accused to prove prejudice, non examination of the investigating officer is not fatal. Further there is no contradiction recorded in the evidence of prosecution witnesses examined.

13. Though DW1 was examined on the side of the accused to prove that he was falsely implicated in the case, but he had denied any connection with Sahadevan Pillai and he had denied the suggestion that on account of enmity of Sahadevan Pillai that he has been falsely implicated. So false

implication as claimed by the accused is not established as well.

14. In this case the property list shows that the articles were produced before court on the same day and Ext.P5 chemical analysis report shows that specimen seal seen on the bottle tallied with the specimen seal provided. That shows that the specimen seal impression was provided in the forwarding note. Further PW4 had stated in his evidence that he had sent a requisition to court to send the sample for analysis and this aspect was not cross examined as well. So under the circumstances there is no delay in producing the articles and there is no possibility of tampering also. Further the remnant of the label and seal seen on MO1 were identified by Pws 1 and 2 as well. So under the circumstances the court below was perfectly justified in coming to the conclusion that prosecution has proved beyond reasonable doubt that the accused was found to be in possession of arrack which is an offence under sections 8 of the Abkari Act and rightly convicted the accused for the above said offences.

15. Regarding the sentence is concerned, the court below had sentenced him to undergo rigorous imprisonment

for three years and to pay a fine of Rs. One lakh, in default to undergo rigorous imprisonment for one year.

16. The prosecution has no case that the accused has involved in any other crime of similar nature. Further he was aged only 36 years at the time of commission of the offence. It is true that persons who are committing the offence under the Abkari Act are committing the same knowing that it was an offence for their personal gain ignoring consequences of their act and innocent persons are consuming such illegally manufactured arrack. In such circumstances showing undue leniency will give a wrong signal to the society and people will lose confidence in the criminal delivery system. But at the same background of the accused can be taken note of by the court while imposing sentence. Considering these aspects and also considering the fact that a minimum fine of Rs. One lakh already imposed, this Court feels that reducing substantive sentence to one year rigorous imprisonment and default sentence to three months rigorous imprisonment will be sufficient and that will meet the ends of justice. So the substantive sentence and default sentence are modified as

follows:

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

So the appeal is allowed in part. The order of conviction passed by the court below against the accused under section 8(1) of the Abkari Act and sentence of fine of Rs. One lakh imposed by the court below are hereby confirmed but substantive sentence and default sentence are set aside and the same is modified as follows:

The appellant is sentenced to undergo rigorous imprisonment for one year and also to pay a fine of Rs. One lakh, in default to undergo rigorous imprisonment for three months more. Set off was allowed for the period of detention already undergone in this case.

This court place on record appreciation for the legal aid counsel Smt. Sethukutty Amma argued the case with enthusiasm on behalf of the appellant.

Office is directed to communicate a copy of this judgment to the concerned court and also to High Court Legal Services Committee immediately.

Sd/-

K. RAMAKRISHNAN, JUDGE.

/true copy/

P.S to Judge

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