

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

THURSDAY, THE 3RD DAY OF DECEMBER 2015/12TH AGRAHAYANA, 1937

CRL.A.No. 1737 of 2005 ()

AGAINST THE JUDGMENT IN SC 359/2003 of ADDL.SESIONS COURT (ADHOC)-II,
MANJERI DATED 05-09-2005

AGAINST THE ORDER IN CP 55/2003 of JUDICIAL MAGISTRATE OF FIRST
CLASS-I,MANJERI

APPELLANT/ACCUSED:

DEVASSYA @ JOYI,S/O. DEVASSYA,
OOMGATTIRI AMSOM, ODAKKAYAM DESOM, ANIKKAL
ERNAD TALUK.

BY ADVS.SRI.JOSEPH SEBASTIAN PURAYIDAM
SMT.MABLE.C.KURIAN
ADV.A.R.USHA(LEGAL AID COUNSEL)

RESPONDENT/COMPLAINANT:

STATE OF KERALA REP. BY
EXCISE INSPECTOR, MANJERI THROUTH THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA.

BY PUBLIC PROSECUTOR SRI.JIBU P.THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 03-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. RAMAKRISHNAN, J.

.....
Crl.A.No.1737 of 2005
.....

Dated this the 3rd day of December, 2015

JUDGMENT

The accused in S.C.No.359/2003 on the file of the Additional Sessions Court, Adhoc-II, Manjeri, is the appellant herein. The appellant was charge sheeted by the Excise Inspector, Manjeri excise range in Crime No.16/2002 of that excise range under section 55(a) and 8(1) of the Abkari Act.

2. The case of the prosecution in nutshell was that on 25.8.2002, at about 6 p.m, the accused was found manufacturing illicit arrack in a thatched shed in his possession and he was found to be in possession of 4 litres of illicit arrack in a black can having the capacity of 5 litres and also found to be in possession of wash, a material used for manufacturing arrack in Oomgattiri amsom and Odakkayam desom and thereby he had committed the offence punishable under sections 55(b) and 8(1) of the Abkari Act.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court-I, Manjeri, where it was taken on file as C.P.No.55/2003. After complying with the formalities, the learned Magistrate committed the case to

Sessions Court, Manjeri, where it was taken on file as SC.No.359/2003 and thereafter it was originally made over to the Assistant Sessions Court, Manjeri for disposal. Subsequently the case was withdrawn by the Sessions Judge and made over to the Additional Sessions Court, Adhoc-II, Manjeri for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under sections 55(b) and 8(1) and (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 6 were examined and Exts.P1 to P7 and Mos1 to 10 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 he had not committed any offence and he has been taken into custody and 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 but no defence evidence was adduced on his side except marking of Ext.D1 through PW1. After considering the evidence on record, the

court below found the appellant guilty under sections 55(b) and 8(1) and (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 Rs.One lakh, in default to undergo rigorous imprisonment for one year more under sections 8(1) and (2) of the Abkari Act and no separate sentence was awarded for the offence under section 55 (b) of the Abkari Act. Set off was allowed for the period of detention already undergone 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. Since counsel who filed the appeal did not appear, this Court appointed Smt. A.R. Usha, Advocate, Ernakulam as legal aid counsel. Heard legal aid counsel Smt. A.R. Usha and Sri. Jibu P.Thomas, Public Prosecutor appearing for the State.

6. The legal aid counsel appearing for the appellant submitted that there is discrepancy in the place of seizure in the search list where house number has mentioned whereas in Ext.P2 seizure mahazer no such number was mentioned and it was said to have been seized from a shed. This discrepancy has not been explained by the prosecution. Further, search memo

has not been produced or marked in this case. So under such circumstances, it cannot be said that search was conducted after complying with the formalities and the search is illegal. Further, there is no evidence adduced on the side of the prosecution to prove either the shed or the house belonging to the accused. Further, there is discrepancy in the evidence of PWs1 and 4 regarding the person who had taken the sample etc. So under the circumstances, it cannot be said that the prosecution has proved the case beyond reasonable doubt and he is entitled to get acquittal.

7. On the other hand, learned Public Prosecutor submitted that the evidence of Pws 1 and 4 will go to show that search was conducted from the shed and articles were seized from the shed and he was red handedly caught. Further, there is no delay in producing the articles and as such, the court below was perfectly justified in convicting the appellant for the offence alleged.

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

On 25.8.2002, at about 6 p.m, while Pw1, the Preventive Officer attached to excise special squad, Malappuram was doing

patrol duty along with PW4 and others, they got information that the accused was engaged in manufacturing of arrack and immediately he sent search memo to court and rushed to the spot and found the accused engaged in distillation of arrack in a shed. He found that 4.5 litres of arrack was collected in two containers and there was wash in the vessel kept in the oven and there were also other materials used for manufacturing arrack. He had taken sample from the arrack in two bottles and also took sample from the wash and sealed the same and affixed label. He destroyed the remaining wash. He seized Mos 1 to 10 including sample wash and arrack taken. He had prepared Ext.P1 search list and thereafter seized articles as per Ext.P2 seizure mahazer in the presence of Pws 2 and 3. He arrested the accused and prepared Ext.P3 arrest memo and gave Ext.D1 arrest intimation to his brother. Thereafter he came to the excise range office and entrusted the articles and the accused to the guard Balakrishnan, who was on duty in the range office and he registered Ext.P4 occurrence report as Crime No.16/2002 against the accused. On the next day, the person in charge of excise office, entrusted the accused and the contraband articles entrusted to him to PW5, who registered

Ext.P5 occurrence report as Cr.No.16/2002 of that excise range. He produced the accused along with the contraband articles before court. He sent Ext.P6 forwarding note and the sample was sent from court and Ext.P7 chemical analysis report obtained. Investigation in this case was conducted by PW6. He collected Ext.P7 chemical analysis report and submitted final report.

9. Pws 2 and 3 are the independent witnesses to the search and seizure. PW2 had stated that the accused is an employee under him and PW3 also stated that he is employed under PW2 and both of them knew the accused. Though they admitted the signatures in Exts.P1 to P3, they denied having seen the arrest and seizure of any article from the possession of the accused and according to them, they signed the same from the concerned excise office on the next day when they went there for taking the accused on bail on the basis of the information given by the wife of the accused to them. So their evidence is not sufficient to prove either the arrest or seizure.

10. PW1 is the detecting officer. According to him, while they were doing patrol duty, when they got information regarding the accused engaged in manufacturing of arrack in his

house, immediately he prepared search memo and sent it through an excise guard by name Nadesan and he went and returned within 5 minutes stating that it was sent by post. Thereafter search was conducted and articles were seized. PW1 had not mentioned anything about the person to whom the search memo was entrusted for the purpose of sending the same to court. Further, he had also stated that he did not take sample and he did not state as to who had taken the sample from the contraband article alleged to have been seized. It was admitted by him that there was no number to the shed from where the articles were seized. But it will be seen from Ext.P1 search list that the door number mentioned as UP II/723 as the place of search and it is also mentioned in the column from what part of the house obtained that ടി വീടിന്റെ തെക്കുപടിഞ്ഞാറെ മൂലയിൽ ഉണ്ടായിരുന്ന മേശപുറത്തു നിന്നും ഉദ്ദേശം 4 ലിറ്റർ ചാരായമടക്കം ഉദ്ദേശം 5 ലിറ്റർ കന്നാസ്. ടി വീടിന്റെ വടക്കു കിഴക്കേ മൂലയിൽ വച്ച് ചാരായം വാറ്റി കൊണ്ടിരിക്കുന്നു.

11. So it will be seen from the search list that the alleged distillation was done from the house with door No.UPII/723 and not from the shed. Nothing about the shed was mentioned in

the search list. But in Ext.P2 seizure mahazer, nothing mentioned about the house with number mentioned in Ext.P1 search list. But it is only mentioned that everything was done from the shed where the accused was alleged to be engaged in distillation of arrack. This discrepancy regarding the place of search found in Ext.P1 search list and Ext.P2 seizure mahazer was not explained either by PW1 or PW4. Further, the investigating officer namely PW6 did not mention as to whether he had conducted any investigation. He had only stated that he had collected the chemical analysis report and produced the same before court and completed the investigation. So the genuineness of the place from where the search was conducted and the alleged contraband articles were seized have not been explained by the prosecution.

12. It is true that all other documents prepared reached the court in time without delay. But that alone is not sufficient to come to the conclusion that the search and seizure was legal and it has to be established by the prosecution beyond reasonable doubt that the search was conducted in a particular place and seizure was effected from that place and accused was found to be in possession that house or the shed from where the

contraband article was seized. There is also some discrepancy in the date of arrest mentioned in Ext.P3 arrest memo and Ext.D1 arrest intimation. But it was explained by PW1 that it was only a mistake and that was corrected by him as date of preparation of Ext.D1 was seen as 25.8.2002. Further in this case though Pws 1 and 4 had stated that they have prepared a search memo and sent to court, no search memo is seen produced or marked in this case. The person through whom search memo was alleged to have been sent namely excise guard Nadesan was not even cited as witness and he was not examined as well. Section 36 of the Abkari Act shows that search and seizure has to be conducted as far as possible as provided under the Code of Criminal Procedure. Since there is discrepancy in the the search list and seizure mahazer regarding the exact place from where search was conducted and seizure was effected and in the absence of production of search memo and marking the same, it cannot be said that the prosecution has proved beyond reasonable doubt that they have conducted search of the place in respect of which they got information in accordance with law. If the search is found to be illegal for non production of the search memo and discrepancy

regarding the place from where the seizure was effected as found in Ext.P1 search list and Ext.P2 seizure mahazer, then it cannot be said that the prosecution has proved beyond reasonable doubt that the search and seizure was legal so as to convict the accused for the offence alleged on the basis of such seizure. Further there is no document produced on the side of the prosecution to prove that the accused was either the owner or occupier of the house or shed mentioned in Exts.P1 and P2 so as to connect him with the place of seizure as well. This aspect has not been properly considered by the court below before coming to the conclusion that the prosecution has proved the case against the accused beyond reasonable doubt and the conviction entered by the court below on the basis of such appreciation is unsustainable in law and the same is liable to be set aside. The appellant is entitled to get acquittal of the charge leveled against him giving him the benefit of doubt. In view of the finding that the appellant is entitled to get 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 sentence passed by the

court below against the appellant under sections 55(a), 8(1) and (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. Fine amount, if any, remitted by the appellant before the court below is directed to be returned to him on making necessary application for that purpose.

This Court place appreciation on record for the manner in which the case was argued by the legal aid counsel Smt A.R.Usha for the appellant.

Office is directed to communicate a copy of this judgment to the concerned court at the earliest.

Sd/-

K. RAMAKRISHNAN, JUDGE.

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/true copy/

P.S to Judge

