

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

WEDNESDAY, THE 10TH DAY OF JUNE 2015/20TH JYAISHTA, 1937

CRL.A.No. 1748 of 2005 ()

**AGAINST THE JUDGMENT IN SC 134/2003 of ADDL.SESIONS COURT
FAST TRACK COURT -III,(ADHOC) MANJERI DATED 08-09-2005**

AGAINST THE JUDGMENT IN CP 120/2002 of J.M.F.C.,NILAMBUR

APPELLANT(S):

**SUBRAMANIAN,
S/O.PONNAPARAMBIL CHAICHAN,
KURUMBAANGODE, VELLIMATTOM,
NILAMBUR, MALAPPURAM DISTRICT.**

BY ADV. SRI.K.M.SATHIANATHA MENON

RESPONDENT(S)/COMPLAINANT/STATE:

- 1. THE EXCISE INSPECTOR,
NILAMBUR RANGE, NILAMBUR,
MALAPPURAM DISTRICT.**
- 2. STATE OF KERALA, REPRESENTED BY
THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM.**

R1 & R2 BY PUBLIC PROSECUTOR SMT.SEENA RAMAKRISHNAN

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 10-06-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

STK

P.D. RAJAN, J.

Crl. Appeal No.1748 of 2005

Dated this the 10th day of June, 2015

JUDGMENT

This appeal is preferred against the judgment in S.C.134/2003 of the Additional Sessions Judge, (Adhoc-III), Manjeri, where the appellant was convicted under Section 55(a) and 8 (1) and (2) of the Kerala Abkari Act and sentenced to imprisonment for two years and fine of Rupees One lakh under Section 8(2) of the Abkari Act, in default of payment of fine, simple imprisonment for six months and no separate punishment was imposed under Section 55(a) of the Abkari Act.

2. The prosecution allegation was that on 11.01.2001, at about 6 pm, while the Excise Inspector, Nilambur Range was conducting patrol duty, he found the appellant in possession of 2 litres of arrack in a plastic can near to the forest Jenda situated at Vellimattam in Kurumbalangode, Malappuram District. He intercepted the appellant, seized the contraband articles and arrested him. He registered a crime and occurrence

report against the appellant and produced the seized articles before court. After completing investigation, he laid charge before Judicial First Class Magistrate, Nilambur, from there it was committed to Sessions Court, Manjeri. Prosecution examined PW1 to PW5 and marked Ext.P.1 to P9 as documentary evidence and MO1 was admitted as material object. The trial court after analyzing the evidence convicted him.

3. The learned counsel appearing for the appellant contended that two independent witnesses did not support the seizure, which will affect the credibility of the prosecution case. The possession of seized articles were not proved in the trial court and the appellant is entitled to get the benefit of doubt.

4. The seizure of arrack was witnessed by PW2, the Excise Guard attached to Excise Range Office, Nilambur. His evidence shows that on 11.01.01, PW3 was conducting patrol duty, he accompanied him and they reached at Vellimattom, the appellant was found near forest Jenda with a plastic can. PW3 intercepted him,

inspected the can and detected 2 litres of arrack in the can. PW3 tasted the liquid, identified the liquid as arrack and the sample was taken from the bottle and affixed the label in the sample at the place of occurrence itself. He prepared Ext.P1 seizure mahazar. He also identified the balance arrack and the kannas after taking sample. The above seizure was supported by PW3, the Preventive Officer. The Preventive Officer arrested the appellant from the place of occurrence. Ext.P2 is the arrest memo. Ext.P3 is the arrest notice. Reaching at the Excise Range Office, PW5 registered Ext.P4 Crime No.3/2001 and occurrence report. The independent witnesses PW1 and PW4 admitted signature in Ext.P1. Analyzing the oral testimony of PW2 and PW3 and the signature in Ext.P1, the trial court was of the view that MO1 was seized from the possession of the appellant.

5. The learned Public Prosecutor submitted that the independent witnesses admitted signature in the seizure mahazar and there is no reason to discard their oral testimony on the ground that they turned hostile. No

enmity was alleged against the Excise Officials by the appellant, if that be the position, no reason to interfere in the findings recorded by the trial court.

6. In this context, I have considered the nature of the liquid in MO1 seized as per Ext.P1. PW5 deposed that a sample of 360 ml was taken and sealed and affixed label and obtained the signature of the appellant from the place of occurrence. The balance arrack was kept in MO1 and sealed at the place of occurrence and produced before court on the next day. From there, the sealed sample packet was forwarded to chemical examiner's lab. Ext.P7 is the report received from the chemical examiner's laboratory. In Ext.P7, ethyl alcohol at the rate of 35.85% by volume was detected. Therefore, accepting the report in Ext.P7, the content in MO1 was found to be arrack and the prosecution established that point also.

7. The next question is, what is the impact of the hostility of the independent witness who attested Ext.P1 seizure mahazar. PW1 and PW4 admitted that they put their signature in Ext.P1. When they deposed before court

they admitted their signature in Ext.P1 but stated that they did not see the seizure. The learned counsel for the appellant submitted that the alleged seizure is not proved. If mahazar witness turned hostile, when they appeared before court for adducing the evidence, the court cannot fully throw out the prosecution case on that ground alone. Then the primary responsibility of the court is to scrutinize the evidence of the official witness more rigorously. After rigorous examination of the evidence, if the materials produced is found credible and strong enough to believe their version, there is no harm in convicting the accused.

8. In a search, independent witness is insisted in order to ensure fairness in search. The question of hostility of independent witness when they appear is the major threat faced by the trial court now-a-days. The requirement of independent witness provided that witness should be impartial and the proceedings are done in good faith which will fasten the credibility of the proposed prosecution case. If they subsequently withdraw and

admit their signature in the disputed documents of seizure and the evidence of the Excise Officials is found reliable, there is no harm in accepting such evidence of the Excise Officials. No infirmity attached to the testimony of Excise Officials merely because they belong to Excise Department, since no hostility is alleged against the appellant at the time of seizure or during trial. Where the evidence of Excise Officials after careful scrutiny inspires confidence in the minds of the court, the seizure is according to the rules established by law and found to be trust-worthy and reliable, it can form the basis for conviction and I find no harm in receiving such evidence. The trial court considered all the relevant aspects and convicted the appellant. Therefore, the conviction under Section 8 (1) and (2) of the Abkari Act is confirmed.

9. The learned counsel appearing for the appellant contented that two liters of arrack were seized by the Excise Officials as per the prosecution case. No previous criminal antecedence was reported against the appellant. While advertng to the arguments, this court in **Gopan V.**

State of Kerala (2007 (3) KLT 443), held that: “Mere possession of arrack in any form without any authority would only attract S.8 and not S.58”. Therefore the conviction under Section 55 (a) (1) of the Abkari Act is set aside.

10. The Apex Court in **Sasikumar V. State of Kerala 2012 (4) KLT 867(SC)** held that:

“Before parting with the record of the case, we would like to point out that S.8(2) of the Abkari Act does not fix any upper limit for the fine but lays down that the fine shall not be less than Rs.1,00,000/-. Since the minimum amount of fine prescribed by the law is kept so high, the courts naturally give the default sentence of imprisonment for a substantially longer period. As noted above, the trial court has given the default sentence of one year which was reduced by the High Court to six months. We may note that in cases where poor people like the appellants who may only be the carrier of the arrack or who may be trying to eke out a living from the illegal trade are caught committing the offence, they are hardly in position to pay the fine of Rs.1,00,000/- and for them the default sentence becomes an additional period of incarceration. In a way, fixing the minimum fine at such a high amount, regardless of the countless possible variables in the commission of the offence

under S.8(1), leads to discrimination in favour of those convicts who have sufficient means to pay the fine and, thus, avoid any default imprisonment and the small fines for whom the default sentence would invariably mean an additional sentence of imprisonment. To our mind, it is desirable to leave the Court free in exercise of judicial discretion in the matter of imposition of fine.”

11. Considering the nature of the offence and the character of the appellant, I modify the sentence as follows:

a)The appellant is sentenced to imprisonment for three months and to pay a fine of rupees one lakh under Section 8(2) of the Kerala Abkari Act, in default of payment of fine, to undergo simple imprisonment for 15 days.

b)The period of detention if any, undergone by him during the investigation, enquiry or trial shall be set-off against the term of imprisonment.

This appeal is partly allowed.

STK

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P.A. TO JUDGE

**Sd/-
P.D. RAJAN,
JUDGE**

