

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

TUESDAY, THE 7TH DAY OF JULY 2015/16TH ASHADHA, 1937

CRL.A.No. 1751 of 2005 ()

**AGAINST THE JUDGMENT IN SC 96/2005
of ADDL. SESSIONS COURT (ADHOC) III, PALAKKAD**

APPELLANT(S)/ACCUSED:

**MANIKANDAN,
S/O.VELANKUTTY,
AGED 43 YEARS,
PLACHIKKATHIL HOUSE,
PERINGODU,
KONGAD.**

**BY ADVS.SRI.PHILIP T. VARGHESE
SRI.THOMAS T.VARGHESE**

RESPONDENT(S)/COMPLAINANT:

**STATE OF KERALA, REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM, REPRESENTING THE S.I. OF POLICE
MALAMPUZHA POLICE STATION.**

BY PUBLIC PROSECUTOR SMT.SAREENA GEORGE

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 07-07-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

STK

P.D. RAJAN, J.

Crl. Appeal No.1751 of 2005

Dated this the 7th day of July, 2015

JUDGMENT

This appeal arises out of the judgment in S.C.96/2005 of the Additional Sessions Judge, Fast Track Court-III, Palakkad, in which the accused was convicted under Section 55(a) of the Abkari Act and sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rupees One lakh, in default of payment of fine, to undergo simple imprisonment for six months.

2. The brief facts necessary for indictment were that on 25.09.03 at 17 hours, the Sub Inspector of Police, Kongad was conducting patrol duty within his jurisdiction, he got reliable information that appellant was conducting sale of arrack near Anachilly School at Plachikkad, Peringode. Immediately he proceeded to the place of occurrence at 17.30 hours and found the accused selling arrack to two persons from a can. He arrested the appellant and inspected the can and found 3 litres of arrack in it. The arrack and the glass were taken into

custody after preparing a mahazar. He took sample from the can and seized ₹110/- from the appellant. Reaching at the Police Station, he registered a crime and after completing investigation, Sub Inspector of Malampuzha Police Station laid charge before Judicial First Class Magistrate Court-II, Palakkad. From there, the case was committed to Sessions Court, Palakkad.

3. For establishing the criminal liability, prosecution examined PW1 to PW8 and recorded their oral testimony. The documentary evidence consists of Ext.P1 to Ext.P9. Material objects MO1 to MO3 were admitted during trial. The incriminating circumstances brought out in evidence were denied by the appellant while questioning him. He did not adduce any defence evidence. The trial court after analyzing the oral and documentary evidence convicted the appellant.

4. The learned counsel appearing for the appellant contended that there was no evidence to prove the sale of arrack. The independent witnesses PW5 and PW6 turned hostile and they did not support the prosecution

case. The seizure of ₹110/- and 3 litres of arrack is not sufficient to attract the offence under section 55(a) of the Abkari Act. Since no sale was proved, the medical examination of PW5 and PW6 shows that over enthusiasm was shown by the detecting officer, which was considered by the trial court and appellant is entitled to the benefit of doubt.

5. The seizure of arrack was stated by the Sub Inspector of Police, Kongad, his evidence shows that on 25.09.2003, he got reliable information that appellant was selling arrack near the Anachilly School. He was examined as PW3 in the trial court. According to PW3, on the basis of that information, he arrived at the place of occurrence with the police party and found the appellant was carrying a 5 litre white can and selling arrack in a glass. In the presence of independent witnesses, he inspected the can and detected 3 litres of arrack in it. The appellant was arrested from the place of occurrence and the contraband articles were taken into custody. While conducting search, PW3 detected ₹.110/- in the

possession of the appellant. He took 3 samples from the arrack each containing 150 ml. He sealed the sample at the place of occurrence. The independent witnesses present there signed in the label, kannas and sample bottle. PW3 realized that PW5 and PW6 who were present there, consumed arrack which was purchased from the appellant. They were taken to the Primary Health Centre, Kongad and conducted a medical examination. Reaching at the Police Station he registered the crime. MO1, MO2 and MO3 were taken into custody after describing in Ext.P4. Ext.P5 is the FIR and Ext.P6 is the arrest memo.

6. PW4 supported the evidence of PW3. His evidence shows that he accompanied PW3 on the date of the incident to Plachikkad, saw the seizure of arrack. He identified his signature in Ext.P4 seizure mahazar and identified MO1 to MO3. These two witnesses were cross-examined by the defence counsel. Nothing has been brought out to discredit their oral evidence. Therefore, the possession of arrack in the custody of appellant is proved in their evidence.

7. The independent witnesses PW5 and PW6 did not support the oral evidence of PW3 and PW4. PW1 examined PW5 and PW6 and issued Ext.P1 and P2 certificates. Examination of PW5 and PW6 and obtaining Exts.P1 and P2 is not sufficient to attract an offence under Section 55(a) of the Abkari Act. PW2 issued Ext.P3 scene plan. But he admitted their signature in Ext.P4. When there is no direct evidence with regard to sale of arrack, I am of the view that the examination of PW1 and PW2 is not sufficient to prove the sale of arrack.

8. There is no dispute with regard to the investigation in this case. The investigation in this case was conducted by PW8, the Sub Inspector of Police, Malampuzha Police Station. As per the direction of the Circle Inspector of Hemambika Nagar Police Station, he took the investigation in this case. He arrived at the place of occurrence and prepared Ext.P7 mahazar. The appellant was produced before court with remand application. The sample taken was produced before court with Ext.P8 forwarding note. After chemical examination,

Ext.P9 report was received from the laboratory. Ext.P9 shows that 24.80% by volume of ethyl alcohol was detected in the sample packet. Analysing the evidence in Ext.P9 and report of PW3 and PW4, offence under Section 8(1) and (2) were proved against the appellant.

9. In **Gopan V. State of Kerala 2007(3) KLT 443**, it was held that;

“7. In the above circumstances, this Court is of the view that the conviction and sentence awarded against the appellant under S.58 of the Abkari Act shall be converted to that of under S.8 the Abkari Act. Hence, the appellant is convicted under S.8 (1) read with S.8(2) of the Abkari Act. Considering the fact that the appellant was in possession of a small quantity of arrack, the Trial Court took a lenient view in awarding sentence. Hence, this Court is of the view that the sentence awarded by the Court below to undergo simple imprisonment for two years and to pay fine of ₹.1,00,000/- and in default to undergo simple imprisonment for a further period of six months is sufficient punishment. Ordered accordingly.”

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 ₹.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 ₹.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 fries 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.”

10. Hence I am of the view that the conviction and sentence passed by the trial court under Section 55 (a) of the Abkari Act is to be set aside and the appellant is convicted under Section 8(1) and (2) of the Abkari Act and sentenced as follows;

a) The appellant is sentenced to undergo imprisonment for three months under Section 8(2) of the Abkari Act.

b) He is also sentenced to pay a fine of Rupees one lakh, in default of payment of fine, simple imprisonment for 15 days.

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

This appeal is partly allowed.

STK

Sd/-
P.D. RAJAN,
JUDGE

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P.A. TO JUDGE

