IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

FRIDAY, THE 19TH DAY OF JUNE 2015/29TH JYAISHTA, 1937

CRL.A.No. 2127 of 2004 (C)

AGAINST THE ORDER/JUDGMENT IN SC 523/2003 of ADDL.DISTRICT COURT (ADHOC), KOZHIKODE DATED 06-12-2004

APPELLANT/ACCUSED:

RAMAN, AGED 55 YEARS,
S/O. VALANCHI,
PARAYARU KUNNATH HOUSE,
P.O.KANNANKARA, VIA.KAKKODI
CALICUT.

BY ADV. SRI.P.V.KUNHIKRISHNAN

RESPONDENT:

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

BY PUBLIC PROSECUTOR SRI.GITHESH R.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 19-06-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

STK

P.D. RAJAN, J.

Crl. A. No.2127 of 2004

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Dated this the 19th day of June, 2015

JUDGMENT

This appeal is preferred against the judgment in S.C.523/2003 of Additional District & Sessions Judge, Fast Track Court (Adhoc-1), Kozhikode for offences punishable under Section 8(1) and (2) of the Abkari Act. The appellant was convicted under Section 8(1) and (2) 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 the payment of fine, to undergo simple imprisonment for six months.

2. The prosecution allegation was that on 17.10.2000, while Excise Inspector and his party was conducting patrol duty within his jurisdiction at about 1.15 pm, they reached in front of the house of one Meledath Balaraman, the appellant was found carrying a plastic can. On seeing the Excise party, he tried to flee from the place of occurrence, they intercepted him and inspected the can and detected 2 litres of arrack in the can. The

appellant was arrested and arrack was seized after preparing a mahazar. Reaching at the Excise Office, they registered crime and occurrence report and after completing investigation, Excise Inspector, Chelannur Excise Range Office filed final report before Judicial First Class Magistrate-III, Kozhikode. From there, it was committed to Sessions Court for trial.

3. To prove the offence, prosecution examined PW1 to PW4 and marked Ext.P1 to P5. The incriminating circumstances brought out in evidence were denied by the appellant while questioning him. He was also heard under Section 232 Cr.P.C. He did not adduce any evidence. The trial court after analyzing the evidence convicted the appellant.

4. The learned counsel appearing for the appellant contented that no request was made to send the sample bottle to the chemical examiner's lab. This shows that the seized arrack was forwarded with a forwarding note. When there is no forwarding note, appellant is entitled to get the benefit of doubt. Relied the decision in **Joseph V.**

State of Kerala 2009(4) KHC 537.

5. While adverting to the arguments advanced by the appellant, I have considered the nature of the arrest and seizure of the contraband liquor from the possession of the appellant. Any Abkari Officer may without any warrant in any public place or open place other than a dwelling house has the power to seize and detain the liquor or any intoxicating drug or any implements or apparatus or any vehicle or any receptacles according to the Abkari Act. The evidence of PW1 shows that as per the powers conferred under the Abkari Act, he seized the arrack from the possession of the appellant on 17.10.2000 at 1.15 pm in front of the house of one Balaraman. Thereafter, he took sample of 180 ml in a bottle as sample and sealed at the place of occurrence itself. The samples were labelled in the presence of the independent witness after preparing Ext.P2 mahazar. The seal impression was also made in Ext.P2. Reaching at the Police Station, he registered Ext.P3 crime. Ext.P4 is the property list and Ext.P1 is the arrest memo.

Subsequently, the seized articles were produced before court, from there, it was forwarded to the chemical examination lab.

6. The seizure was supported by PW2, then Preventive Officer Chelannur Excise Range. He identified MO1 cannas which contained balance arrack after taking sample. PW1 and 2 were cross examined by the defence counsel and nothing has been brought out to discredit their oral testimony. PW3 was also the Excise Inspector who conducted the investigation and laid charge before court. PW4 identified signature in Ext.P1, Ext.P2 and MO1. But he did not see the seizure of arrack from the possession of the appellant. No reasons are stated by the appellant to disbelieve the oral testimony of PW1 to PW3. The fact that PW1 to PW3 belong to Excise Department is not a ground to discard their evidence.

7. The learned Public Prosecutor submitted that the contraband articles were forwarded to chemical examiner's lab through court after preparing a forwarding note. The forwarding note was produced before the trial

court which was not marked by that court. Non-consideration of the forwarding note by the trial court did not cause any prejudice to the appellant. Since other formalities were complied by the trial court, he is not entitled to get the benefit on the basis of the above decision.

8. In this context, I have considered whether there is any non-production of the forwarding note. In this case the forwarding note was properly prepared by the Excise Inspector and produced before court, which was not marked by the trial court. Forwarding note was prepared by Excise Inspector on 17.10.2000, which was counter signed by the Judicial First Class Magistrate-III, Kozhikode. Sample seal was also affixed in the space provided for marking the sample seal, in which it was specifically instructed that not less than 50 ml of the sample should be forwarded in each case for chemical analysis. From the report of the Excise Inspector, it is clear that the samples were produced on 17.10.2000. Samples were forwarded to the chemical examiner's lab through court

as per the request made by the Excise Inspector on 17.10.2000. In **Joseph V. State of Kerala (2009 (4) KHC 537)** it was held that "no request or forwarding note is either produced or marked to indicate that a request was made to the Magistrate to send the sample bottle to the chemical examiner for analysis. In the absence of any forwarding note or requisition, and in the absence of any explanation as to how the Magistrate forwarded sample to the chemical examiner, evidence adduced by the prosecution in that regard cannot be relied upon." Therefore, the above decision will not in any way help the appellant in this respect. Therefore, the contention itself is to be rejected.

9. Analyzing the evidence in this case, it is found that the lower court considered all relevant aspects and convicted the appellant. I find no reason to interfere in the conviction passed by the trial court. 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 ₹.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. Considering the nature of the offence and quantity seized from the possession of the appellant, I am of the opinion that he is entitled to leniency in sentence, hence the sentence is modified as follows:

a)He is sentenced to imprisonment for two months and a fine of rupees one lakh under Section 8(1) and (2) of the Kerala Abkari Act, in default of payment of fine simple imprisonment of 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.

Sd/-
P.D. RAJAN,
JUDGE

STK

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P.A. TO JUDGE