

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

TUESDAY, THE 1ST DAY OF DECEMBER 2015/10TH AGRAHAYANA, 1937

CRL.A.No. 2134 of 2004 ()

SC 48/2003 of ADDL.SESIONS COURT FAST TRACK (ADHOC)-II, KOZHIKODE

APPELLANT(S)/ACCUSED:

BABY, S/O. CHACKO,
THEKKUMKKATTIL HOUSE, THANNIKUNNU, KOOMBARA
KODARANHI AMSOM, KOZHIKODE DISTRICT.

BY ADV. SRI.BABU JOSEPH KURUVATHAZHA

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA, REPRESENTED BY THE
INSPECTOR OF POLICE, THIRUVAMBADY POLICE STATION
THIRUVAMBADY P.O., KOZHIKODE DISTRICT
REPRESENTED BY PUBLIC PROSECUTOR
HIGH COURT OF KERALA.

R1 BY PUBLIC PROSECUTOR SMT. SEENA RAMAKRISHNAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 01-12-
2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SKV

K.RAMAKRISHNAN, J.

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Crl. Appeal No. 2134 OF 2004

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Dated this the 1st day of December, 2015

JUDGMENT

The accused in SC 48/2003 on the file of the Additional Sessions Judge, (Adhoc-II), Kozhikode is the appellant herein. The appellant was charge sheeted by the Sub Inspector of Police, Thiruvambadi Police Station in Crime No.41/2001 of that police station under Section 55 (a) of the Abkari Act (ought to be under Section 8(1) of the Abkari Act).

2. The case of the prosecution in nutshell was that on 6.5.2001 at about 3.20 pm, the accused was found to be in possession of 700 ml of illicit arrack in 1 ½ litres of plastic bottle kept in the kitchen of his house with No.8/691 of Koodaranji Panchayath for the purpose of sale in violation of the provisions of the Abkari Act and thereby he had committed the offence punishable under Section 55(a) of the Abkari Act.

3. After investigation, final report was filed before the Judicial First Class Magistrate's Court-II,

Thamarassery where it was taken on file as CP 46/2002. After complying with the formalities, the learned Magistrate committed the case to the Sessions Court, Kozhikode under Section 209 of the Code of Criminal Procedure (hereinafter called as the Code). After committal, the case was taken on file by the Sessions Court as SC 48/2003 and thereafter it was originally made over to First Additional Assistant Sessions Court, Kozhikode for disposal. Thereafter it was withdrawn by the Sessions Judge and made over to Additional Sessions Court (Adhoc-II), Kozhikode for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under Section 55 (a) of the Abkari Act was framed (ought to be under Section 8(1) of the Abkari Act) and the same was read over and explained to him and he pleaded not guilty. In order to prove the case of the prosecution, PWs1 to 6 were examined and Exts. P1 to P13 and MO1 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. 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. After considering the evidence on record, the court below found the appellant guilty under Section 55(a) of the Abkari Act and convicted him thereunder and sentenced him to undergo rigorous imprisonment for one year and also to pay a fine of Rs.1,00,000/- in default to undergo simple imprisonment for 6 months. 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 the counsel for the appellant did not appear, the case was posted to 30.11.2015 in the disposal

list and it continued in the disposal list even today and even today there was no representation for the appellant.

6. Heard the learned Public Prosecutor Smt. Seena Ramakrishnan and peruse the records.

7. The Public Prosecutor submitted that the evidence adduced on the side of the prosecution proved the guilt of the accused beyond reasonable doubt and there is nothing to interfere in the order passed.

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

On 6.5.2001, at about 3.20 pm, while PW1 the Sub Inspector of Police, Thiruvambadi Police Station was doing patrol duty, he got information that the accused was in possession of arrack in his house and immediately he prepared Ext.P1 search memo and sent the same to court. Thereafter he went to the house of the accused and conducted search of the house and found MO1 bottle having 1½ litres of capacity, containing 700 ml liquid, kept on the platform of the kitchen of the house. He

conducted the search in the presence of the accused and PWs 3 and another. On examination of the contents of MO1 bottle, he was convinced that it was arrack. So he arrested the accused and prepared Ext.P3 arrest memo and intimated the arrest to the wife who was present there and conducted his body search and prepared Ext.P4 inspection memo. He took sample from the liquid found in MO1 bottle and sealed the same and affixed label containing the signatures of himself, witnesses and the accused and he had also sealed and labelled the MO1 bottle also in the same manner and seized the same as per Ext.P2 search list. Thereafter he came to Police Station along with accused and the contraband articles seized and registered Ext.P5 First Information Report as Crime No.41/2001 of Thiruvambadi Police Station against the accused under Section 55(a) of the Abkari Act. He produced the accused before court along with Ext.P6 remand report. He produced the articles along with Ext.P7 property list and as directed by the Magistrate, he

produced the same on the next day before the court. He sent Ext.P8 forwarding note with a request to send the sample for analysis and same was sent from court and Ext.P9 chemical analysis report obtained. The investigation in this case was conducted by PW5. He went to the place of occurrence and prepared Ext.P13 scene mahazar in the presence of witnesses. As requested by him PW4, the Village Officer, prepared Ext.P12 sketch of the place of occurrence. Thereafter he handed over the investigation to PW6, the Sub Inspector of Police Thiruvambadi Police Station who verified the investigation conducted by PW5. He obtained Ext.P10 ownership certificate from the panchayath office which will go to show that the accused is the owner of the house. He collected Ext.P9 chemical analysis report and completed the investigation and submitted final report.

9. PW3 is an independent witness to seizure. Though he admitted his signature in Ext.P2 search list, he denied having seen the seizure and denied having stated

in Ext.P11 when he was questioned by the investigating officer. So his evidence is not helpful to prove the seizure. PW1 is the detecting officer and PW2 is head constable who accompanied him. PW1 had deposed that on 6.5.2001, while he was doing patrol duty along with PW2 and others and at about 3.20 pm, he got information that the accused was keeping arrack in his house. Immediately, he sent Ext.P1 search memo to court and went to the house of the accused and conducted search of the house in the presence of PW3 and others. He found MO1 bottle in the kitchen containing 700 ml of arrack which he satisfied on by smelling and tasting. He arrested the accused. He took the sample and sealed and labelled the same and also MO1 bottle and came to Police Station and registered the crime. The evidence of PW1 on this aspect was corroborated by the evidence of PW2, the head constable who accompanied him. Though they were cross examined at length, nothing was brought out to discredit their evidence on this aspect and so the court

below was perfectly justified in coming to the conclusion that the accused was found to be in possession of MO1 bottle containing 700 ml liquid said to be arrack and the search and seizure and arrest are legal.

10. It will be seen from the evidence of PW1 that the accused was produced before the court along with Ext.P6 remand report and the articles were produced along with Ext.P7 property list and as directed by the Magistrate, the articles were produced before the court on the next day. It will be seen from Ext.P8 forwarding note that the specimen seal impression of the seal used for sealing the sample bottle provided and that was tallied with the chemical examiner and which is evidenced by Ext.P9. Ext.P10 shows that the accused was the owner of the house. So it is clear from this, that he is in control of the house and so the court below was perfectly justified in coming to the conclusion that he was in conscious possession of the arrack and rightly convicted him for the possession of arrack which ought to be under Section 8(1)

of the Abkari Act but under 55 (a) of the Abkari Act. This Court did not find any reason to interfere with the finding of the court below regarding the conviction entered for the offence alleged.

11. As regards the sentence is concerned, court below had sentenced him to undergo rigours imprisonment for one year and also to pay a fine of Rs.1,00,000/- in default to undergo simple imprisonment for 6 months. Being an Abkari offence showing undue leniency will give a wrong signal to the society and it may cause loss of confidence for the people in the criminal justice delivery system. But at the same time, the court can consider the nature of the contraband article, quantity of the contraband article, the family background of the accused etc. for showing leniency as mitigating circumstance while imposing the sentence. In this case the prosecution has no case that the petitioner has involved in any other crime of similar nature earlier. The quantity seized is only 700 ml. He is aged 40 at the time

when the offence was committed and he will be more than 55 years now. So considering these aspects, this court feels that sentencing the accused to undergo Simple Imprisonment for three months and also to pay a fine of Rs.1,00,000/-in default to undergo simple imprisonment for two months will be sufficient and that will meet the ends of justice. So the substantiate sentence and default sentence imposed by the court below are set aside and the same is modified as follows:

The appellant is sentenced to undergo simple imprisonment for three months and also to pay fine of Rs.1,00,000/- in default to undergo simple imprisonment for six months more. Set off is allowed for a period of detention already undergone by him under Section 428 of the Code.

In the result the appeal is allowed in part. The order of conviction passed by the court below and sentence of fine of Rs.1,00,000/- imposed are hereby confirmed but the substantive sentence and default

sentence are set aside and same is modified as follows:-

The appellant is sentenced to undergo simple imprisonment for three months and also to pay a fine of Rs.1,00,000/- in default to undergo simple imprisonment for two months more. Set off is allowed for a period of detention already undergone.

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

Sd/-

K.RAMAKRISHNAN, JUDGE

SKV