

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

THURSDAY, THE 19TH DAY OF NOVEMBER 2015/28TH KARTHIKA, 1937

CRL.A.No. 2156 of 2004 (C)

AGAINST THE JUDGMENT IN SC 596/1999 of ADDL. DISTRICT COURT (ADHOC-I),
KOLLAM DATED 18-12-2004

APPELLANT/ACCUSED::

SURESH,
S/O. KUNJU KUNJU,
CHARUVILA VEEDU,
KAITHAKODU MURI,
PAVITHRESWARAM VILLAGE
KOLLAM.

BY ADVS.SRI.T.M.CHANDRAN
SRI.R.ARUN

RESPONDENT/COMPLAINANT AND STATE::

STATE OF KERALA REP.BY
PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SEENA RAMAKRISHNAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 19-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. RAMAKRISHNAN, J.

.....
Crl.A.No.2156 of 2004

.....
Dated this the 19th day of November, 2015

JUDGMENT

The accused in S.C.No.596/1999 on the file of the Additional Sessions Court, Adhoc-I, Kollam, is the appellant herein. The appellant was charge sheeted by the Sub Inspector of Police, East Kallada Police station in Crime No.182/1998 of that police station under sections 55(a) and (i) of the Abkari Act.

2. The case of the prosecution in nutshell was that, on 24.10.1998, at about 4 p.m, the accused was found to be in possession of 3.5 litres of arrack in a black cannas of 10 litres capacity, and selling the same from the south western corner of Idayanmuttathu kavu in Uppood muri of east Kallada village, in violation of the provisions of the Abkari Act and thereby he had committed the offence punishable under sections 55 (a) and (i) of the Abkari Act (ought to be under section 8(1) and 55(i) of the Abkari Act).

3. After investigation, final report was filed before the Judicial First Class Magistrate Curt-I, Kollam, where it was taken on file as C.P.No.278/1998. After complying with the

formalities, the learned Magistrate committed the case to Sessions Court, Kollam under section 209 of the Code of Criminal Procedure (hereinafter referred to as 'the Code'). After committal, the learned Sessions Judge took cognizance of the case as SC.569/1999 and the same was originally made over to the Principal Assistant Sessions Court, Kollam for disposal. Later it was withdrawn by the Sessions Judge and made over to the Additional Sessions Court, Adhoc-I Kollam for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under sections 55(a) and (i) 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 5 were examined and Exts.P1 to P4 and MOs1 and II were marked on the side of the prosecution. 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 has been falsely implicated in the case and he has been taken from the work place. Since 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. One witness was examined as DW1 and Exts.D1 to D5 were marked on his side. After considering the evidence on record, the court below found the appellant not guilty of the charge levelled against him under section 55 (i) of the Abkari Act and acquitted him of that charge under section 235(1) but 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 5 years and also to pay a fine of Rs. One lakh, in default to undergo simple imprisonment for one year more. Set off was allowed for the period of detention already undergone. Aggrieved by the same, the present appeal has been preferred by the appellant/accused before the court below.

5. Heard Sri. R. Arun, counsel appearing for the appellant and Smt. Seena Ramakrishnan, Public Prosecutor appearing for the State.

6. Counsel for the appellant submitted that the entire detection, seizure, arrest and investigation were conducted by the Assistant Sub Inspector of Police, who is not an authorized

officer. Merely because final report was filed by the Sub Inspector alone is not sufficient to cure the irregularity in detention and that benefit must be given to the accused. Further, he had also submitted that there was delay of 20 days in producing the article which has not been explained. The reasoning given by the court below for coming to the conclusion that detention by Assistant Sub Inspector is valid and delay is not fatal etc are not sustainable in law in view of the decisions rendered before this court on this aspect. So he prayed for acquittal.

7. On the other hand, Public Prosecutor submitted that the evidence adduced on the side of the prosecution proved beyond reasonable doubt that the accused had committed the offence alleged and as such, the court below was perfectly justified in convicting the accused for the offence alleged.

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

On 24.10.1998, at about 4 p.m, while PW5 the Assistant Sub Inspector of Police attached to east Kallada police station was doing patrol duty along with PW3 and

others, they got a information that the accused was engaged in sale of arrack and immediately they went to the place of occurrence and found the accused carrying MO1 can and MO2 glass in his hand and on seeing the excise party, he tried to go away from the place. So PW5 stopped him and on examination of the can, he found that it contained 3.5 litres of some liquid, which on further examination, he was satisfied that it was arrack. He took sample from the liquid and sealed the same and affixed label containing the signature of himself, witnesses and the accused. He sealed and labelled the can also in the same manner and seized the same as per Ext.P1 mahazer in the presence of PW1 and another. He conducted body search of the accused and when he smell the glass, he found that it was having the smell of arrack. He arrested the accused and came to the police station along with the contraband article and registered Ext.P2 First Information Report as Crime No.182/1998 of East Kallada police station under section 55(a) and (i) of the Abkari Act. He produced the accused along with remand report. He prepared Ext.P3 property list and produced the articles seized before court. He sent the forwarding note

with a request to send sample for analysis and the sample was sent from court and Ext.P4 chemical analysis report obtained and sample contained 36.3% by volume of ethyl alcohol. He questioned the witnesses and recorded their statements. The investigation conducted by PW5 was verified by PW4, the Sub Inspector of Police and he submitted final report.

9. Pws 1 and 2 are the independent witnesses to the seizure and PW1 is the attester to Ext.P1 mahazer as well. Though PW1 admitted his signature in Ext.P1, denied having seen the arrest and seizure of arrack from the possession of the accused. But, both Pws 1 and 2 have admitted that they knew the accused and he was a carpenter by profession in the locality. So it is clear from this that they were trying to hep the accused and that was the reason why they were not supporting the case of the prosecution.

10. PW5 is the detection officer. He had stated that he was as Assistant Sub Inspector of Police and when he was doing patrol duty on 24.10.1998, at about 4 p.m along with PW3 police constable and others, they got information that the

accused was engaged in sale of arrack. Immediately they went to the spot and found the accused standing there with MO1 can and MO2 glass in his hand. On seeing the police party, he tried to run away from the place, but they stopped him and on examination of the kannas, he was satisfied that it was having 3.5 litres of arrack. He took sample, sealed sample bottle and sealed the kannas and seized the articles as per Ext.P1 mahazer. He came to the police station and registered the crime. The evidence of PW5 on this aspect was supported and corroborated by the evidence of PW3, the police constable. Though DW1 was examined on the side of the accused and Exts.D1 to D5 were marked to prove false implication, his evidence and the documents produced were not sufficient to come to the conclusion that the accused has been falsely implicated in the case. There is no motive alleged and proved against the police officers for falsely implicating him in a case like this. So under the circumstances, the court below was perfectly justified in coming to the conclusion that the accused was arrested along with MO1 kannas and MO2 glass said to be containing arrack by PW5.

11. Mere seizure of some articles alone is not sufficient to convict the accused for the offence alleged. It must be proved by the prosecution that articles reached the court in the same condition in which it was seized, in tamper proof condition, and the chemical analysis report relates that article. It must also be proved by the prosecution that the detection was made by a competent officer. Admittedly the Assistant Sub Inspector of Police during 1998 was not an Abkari Officer empowered to detect and investigate offence under the Abkari Act. In this case the entire detection, seizure and investigation was conducted by PW5, who was only an Assistant Sub Inspector of Police. PW4 had only verified the investigation conducted by PW5 and submitted final report. So he had no role in the conduct of the investigation in the case.

12. In the decision reported in **Sabu v. State of Kerala** (2007 (4) KLT 169), this Court has held that the Assistant Sub Inspector of Police is not an authorized officer to conduct an investigation in an offence under the Abkari Act. So detection and investigation conducted by the Assistant Sub Inspector

of Police is not valid and no conviction can be made on the basis of illegal detection made by an incompetent officer. When there is specific bar for conducting investigation under the special statute, the general power provided under the Code will not be helpful which has been relied on by the court below for validating the detection and investigation conducted by the Assistant Sub Inspector of Police, who is not an abkari officer under the Abkari Act. The dictum laid down in **Sabu's case** (cited supra) was confirmed by the Division Bench in **Subash v. State of Kerala** (2008 (2) KLT 1047). The question as to whether Assistant Excise Inspectors are entitled to conduct investigation was considered by this Court in **Subrahmanyam v. State of Kerala** (2010 (2) KLT 470) and this Court has held that Assistant Excise Inspector is not competent to do the same and he is not an Abkari Officer empowered under the Act. The question as to whether detection made by an Assistant Excise Inspector prior to 2009 can be validated on the basis of subsequent notification empowering him to exercise the power of Abkari Act has been considered by this Court in **Sasidharan v. State of Kerala** (2012 (2) KLT 392) and this Court held that detection

and investigation conducted by the Assistant Excise Inspector prior to 2009 is not valid and the accused is entitled to get acquittal on that ground. So under the circumstances, since detection is not valid and conviction based on that illegal conviction is unsustainable in law and the same is liable to be set aside.

13. Further, in this case it is seen from Ext.P3 property list that the articles reached court only on 16.11.1998 though detection was made on 24.10.1998. There is no explanation forthcoming on the side of the prosecution for the delay in producing the article. In the decision reported in **Ravi v. State of Kerala** (2011 (3) KHC 121) a Division Bench of this Court has held that mere delay in producing the articles alone is not sufficient to doubt the genuineness of the articles produced. If the delay is explained, then court can ignore the delay and accept prosecution case. But, if delay is not explained, then that benefit must be given to the accused. If the delay is not explained, then it cannot be said that the articles reached court in tamper proof condition and the chemical analysis report relates to the representative sample

said to have been taken from the contraband articles seized from the possession of the accused. So the benefit must be given to the accused. In this case neither PW5 nor PW4 had explained the delay for producing the article. No report has been filed before court stating the reasons for the delay in producing the article as well. So, under the circumstances, the reasons given by the court below for accepting delay in producing the articles in view of the dictum laid down in the above decisions is also not sustainable in law. So in view of the above discussions, the finding of the court below that prosecution has proved beyond reasonable doubt that the accused was found to be in possession of arrack, which is punishable under section 8(1) of the Abkari Act though punished under section 55(a) and subsequent conviction entered by the court below against the appellant for the said offence is unsustainable in law and the same is liable to be set aside. The appellant is entitled to get acquittal of the charge levelled against him giving him the benefit of doubt. In view of the finding that the appellant is entitled to get acquittal, sentence imposed is 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 section 55(a) 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. The fine amount, if any, remitted by the appellant is directed to be refunded to him by the court below on making necessary application in that regard.

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

Sd/-

K. RAMAKRISHNAN, JUDGE.

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/true copy/

P.S to Judge

