

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

WEDNESDAY, THE 11TH DAY OF NOVEMBER 2015/20TH KARTHIKA, 1937

CRL.A.No.2172 of 2004 ()

AGAINST THE JUDGMENT IN SC 155/2000 of ADDITIONAL DIST. & SESSIONS
COURT (ADHOC)-II, KOLLAM, DATED 27-11-2004.

APPELLANT(S)/ACCUSED:

UNNIKRISHNA PILLAI,
S/O. NEELAKANDA PILLAI,
KUTTALAZHIKATHU THAZHATHIL VEEDU,
NEAR THE SREESIVANMUKKU, CHERUMOODU CHERRI,
PERINADU VILLAGE, KOLLAM.

BY ADVS.SRI.MATHEWS J.NEDUMPARA
SRI.BIMAL K.NATH

RESPONDENT(S)/COMPLAINANT:

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

BY PUBLIC PROSECUTOR SRI.JIBU P. THOMAS

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

SS

K. RAMAKRISHNAN, J.

Crl. Appeal No.2172 of 2004

Dated this the 11th day of November, 2015

JUDGMENT

Accused in S.C.No.155/2000 on the file of the Additional Sessions Court (Ad-Hoc-II), Kollam, is the appellant herein. The appellant was charge-sheeted by the Sub Inspector of Police, Kundara, in C.R.No.220/1999 of Kundara police station under Section 55(a) and (i) of Abkari Act.

2. The case of the prosecution in nut shell was that, on 29.04.1999 at about 5.00 p.m., the accused was found to be in possession of 1.600 liters of Indian Made Foreign Liquor in five bottles with a glass at Perinadu Village, Cherumoodu Cheri near the staircase in between Shine Electronics and Travancore Traders at Cherumoodu Junction on the northern side of Kundara - Anchalumoodu public road for the purpose of sale in violation of the provisions of Abkari Act and thereby he had committed the offence punishable under Section 55(a) and (i) of the Kerala

Abkari Act.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court-I, Kollam, where it was taken on file as C.P.No.81/1999. Thereafter it was committed to the Sessions Court, Kollam by the learned magistrate under Section 209 of the Code of Criminal Procedure (hereinafter called the Code). After committal, the Sessions Court had taken cognizance of the case as S.C.No.155/2000 and it was originally made over to the Additional Sessions Court (Ad-hoc-I), Kollam, for disposal. Thereafter it was withdrawn and made over to Additional Sessions Court (Adhoc-II), Kollam for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under Section 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 MOs 1 to 4 were marked on the side of the prosecution. After closure of the prosecution evidence, the accused was questioned under Section 313 of the Code of Criminal Procedure and he denied all the incriminating circumstances brought against him in the prosecution evidence. He had further stated that, no article was seized from his possession and he has been falsely implicated in the case. He was conducting a tea shop and the Assistant Sub Inspector of police along with police people came and wanted to take non-vegetarian food which was opposed by him. On account of that enmity he has been falsely implicated in the case. Since the evidence in the case did not warrant an acquittal under Section 232 of the Code of Criminal Procedure, the Additional Sessions Judge directed the accused to enter on his defence. DWs 1 and 2 were examined on the side of the accused to prove his case. After considering the evidence on record, the court below

found the appellant guilty under Section 55(a) and (i) of the Abkari Act and convicted him thereunder and sentenced him to undergo rigorous imprisonment for two years and also to pay a fine of ₹1,00,000/-, in default to undergo simple imprisonment for one year under section 55(i) of Abkari Act and no separate sentence was awarded for the offence under Section 55(a) of the Abkari Act. Aggrieved by the same, the present appeal has been preferred by the appellant/ accused before the court below.

5. Heard Sri.Bimal K.Nath, counsel appearing for the appellant and Sri.Jibu P.Thomas, learned Public Prosecutor appearing for the State.

6. The counsel for the appellant submitted that, in this case, detection and registration of crime and seizure etc., were done by Assistant Sub Inspector of Police, who is not an Abkari Officer and as such the seizure is bad in law. Further though the incident occurred on 29.04.1999, the

articles were produced before court only on 10.05.1999 and there was no explanation forthcoming for the delay in producing the article. Further there is no evidence to show that the accused was engaged in sale of the article in order to convict him for the offence under Section 55(i) of the Abkari Act. The counsel relied on the decisions reported in **Hashim T.K. v. Assistant Sub Inspector, Chandera Police Station and Another (2014(1) KHC 283)**, **Rajan v. State of Kerala (2009 KHC 829)**, **Ravi v. State of Kerala and Another (2011 (3) KHC 121)** and **Palarekeezhil Lakshmy v. State of Kerala and Another (2012 KHC 2979)** in support of his case.

7. On the other hand, learned Public Prosecutor submitted that the evidence adduced on the side of the prosecution proved the case against the accused beyond reasonable doubt and the delay has been explained and investigation and final report was filed by the Sub Inspector

of police who is an authorized abkari officer and no interference is called for.

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

On 29.04.1999 at about 5.00 p.m., while PW5 the Assistant Sub Inspector of police who was doing patrol duty along with PWs 3 and 4 and when they reached near the place of occurrence, they saw accused going through the staircase of the building with a glass and a plastic bag in his hand and getting suspicion about his conduct, PW5 stopped him and on verification of the plastic bag/ MO3, it contained five bottles of Indian Made Foreign Liquor, out of which four bottles were full and one bottle having 1/4th. He had examined the contents of the bottle and satisfied that it was Indian Made Foreign Liquor and it was having the sticker of the Kerala State Beverages Corporation. Thereafter he took sample from the opened bottle and thereafter sealed MO1

series and MO2 bottles and thereafter seized MO3 glass along with MO1 series, MO2 and MO3 bag, as per Ext.P1 mahazar in the presence of PWs 1 and 2. Thereafter he arrested the accused and prepared arrest memo. Thereafter he came to police station and registered Ext.P2 first information report as Crime No.220/1999 of Kundara Police station under Section 55(a) and (i) of the Abkari Act. He prepared Ext.P3 property list. He entrusted the accused and the contraband articles to PW6, the Sub Inspector of police who conducted the investigation in this case. He produced the accused and the contraband article before court. On the basis of the requisition given, sample was sent for chemical analysis and Ext.P4 chemical analysis report obtained. He completed the investigation and submitted final report.

9. PWs 1 and 2 were examined to prove the seizure. But they denied having seen the arrest or seizure of any contraband article from the possession of the

accused. But they have stated that they knew the accused, so it is clear from their evidence that, they were trying to help the accused and that was the reason why they were not supporting the case of the prosecution.

10. Then the evidence is that of PWs 3 to 5 to prove the seizure and arrest of the accused. PW5 is the detecting officer and PWs 3 and 4 are the police constables who accompanied him at that time. PW5 was working as Assistant Sub Inspector of police and he was doing patrol duty along with PWs 3 and 4 at about 5.00 p.m., on that day when they reached the place of occurrence, they saw the accused going with MO3 bag in his hand and MO4 glass and he was trying to climb the upstairs of the building, getting suspicion about his conduct, PW5 stopped him and on examination of the bag he found that the accused was carrying five bottles of Indian made Foreign liquor of which 4 bottles were full having the capacity of 375 ml., each and

one bottle was having 1/4th of the same. He had taken sample from that and sealed the bottles and seized the contraband article as per Ext.P1 mahazar. Thereafter he arrested the accused, came to police station and registered the crime. PWs 3 and 4 have corroborated the evidence of PW5 on this aspect. Though they were cross examined at length, nothing was brought out to discredit their evidence on this aspect. The suggestion given that, he was taken from the tea shop was denied by them. DWs 1 and 2 were examined on the side of the accused to prove that on 29.04.1999, the Sub Inspector Sureshkumar came to the tea shop of the accused and there was some altercation occurred and thereafter they have taken the accused from the shop. But the cross examination of the witness will go to show that they have not seen the accused being taken by the police officials and later they came to know that he was implicated in an Abkari case. They did not make any protest

against the action of the police as well. Both of them have stated that they knew the accused and they have only hearsay knowledge of what happened in the tea shop on that day as stated by the accused and there is no occasion for them to remember the date as well. So under the circumstances, court below was perfectly justified in rejecting the evidence of DWs 1 and 2 and finding the evidence of PWs 3 to 5 and rightly came to the conclusion that the accused was arrested by PW5 along with 4 bottles of Indian Made Foreign Liquor.

10. It is an admitted fact that PW5 is not an abkari officer as he is only an Assistant Sub Inspector of police. As per the notification, only police officers half and above the rank of Sub Inspector of police alone were empowered to act as abkari officers to exercise the powers of the abkari officer under the Abkari Act.

11. In the decision reported in **Rajan v. State of**

Kerala (2009 KHC 829), this court had an occasion to consider the question as to whether the detection made by the Assistant Sub Inspector was proper or not and held that, since he is not an abkari officer, the detection and seizure made by him are not proper and that vitiate the trial. The same question was considered by another Single Bench of this court in **Hashim T.V. v. Assistant Sub Inspector, Chandra Police Station and Another (2014(1) KHC 283)**. In that case also the detection was made by Assistant Sub Inspector of police and it was held to be not valid and that benefit was given to the accused and he was acquitted. The question as to whether Assistant Exercise Inspectors are entitled to exercise the power of an abkari officer who has been designated as abkari officer only as per SRO 361/2009 dated 08.05.2009 and whether the detection made by them prior to that notification is valid or not has been considered by this court in **Sasidharan v. State of**

Kerala (2012(2) KLT 392) and this court has held that, the Assistant Exercise Inspector not being an abkari officer designated for the purpose of exercising the power under the Abkari Act till 08.05.2009, the detection made by them prior to that date is not valid and the accused is entitled to get acquittal. Since the detection was made by an officer not competent to do the same under the Abkari Act, the same is vitiated and the seizure and detection made is illegal and on that basis, no conviction can be based and this aspect has not been considered by the court below before coming to the conclusion that the prosecution has established the case against the accused beyond reasonable doubt.

12. Further it is seen from the evidence that though the detection was made on 29.04.1999, the articles were produced before court only on 10.05.1999. Neither PW5 nor PW6 had got any explanation for the delay in

producing the article. They were not even aware as who was in possession of the article till it was produced in court as well. There was no label affixed so as to identify the article on a later occasion, though there was delay in producing the article by the witnesses.

13. In the decision reported in **Ravi v. State of Kerala and another (2011(3) KHC 121)**, the Division Bench of this court has held that, mere delay in producing the article alone is not sufficient to doubt the genuineness of the articles produced, if the delay has been properly explained to the satisfaction of the court. If the delay has not been explained, then that benefit must be given to the accused. The same view has been reiterated in the decision reported in **Palarekeezhil Lakshmy v. State of Kerala and Another (2012 KHC 2929)** also. So once the delay has not been explained, then it cannot be said that prosecution has proved beyond reasonable doubt that the

same article which has been reached the court in a tamper free condition and the chemical analysis report relates to the representative sample said to have been taken from the contraband article seized from the possession of the accused. If this link is not established then, it cannot be said that prosecution has succeeded in bring home the complicity of the accused in the commission of the offence. This was so held in the decision reported in **Sasidharan v. State of Kerala (2007(1) KLT 720)**. These aspects were not considered by the court below before coming to the conclusion that the prosecution has proved the case against the accused beyond reasonable doubt and the chemical analysis report relates to the representative sample said to have been taken from the contraband article alleged to have been seized from the possession of the accused and the conviction entered by the court below on this aspect is unsustainable in law and the same is liable to be set aside.

The appellant is entitled to get acquittal of the charge leveled against him giving him the benefit of doubt. In view of the finding that the appellant is entitled to get acquittal, the sentence imposed by the court below is also 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) and (i) of Abkari Act are hereby set aside. He is set at liberty. The bail bond executed by him will stand cancelled. The court below is directed to refund the fine amount, if any remitted by the appellant on making necessary application for that purpose.

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

Sd/-

K. Ramakrishnan, Judge

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P.A. to Judge