

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 21ST DAY OF DECEMBER 2015/30TH AGRAHAYANA, 1937

CRL.A.No. 1866 of 2005 ()

SC 628/2004 of ADDITIONAL DISTRICT COURT (ADHOC), PATHANAMTHITTA

CP 65/2004 OF JUDICIAL FIRST CLASS MAGISTRATE'S
COURT-II, PATHANAMTHITTA

APPELLANT(S)/ACCUSED.:

BHASKARAN, S/O.KOCHUKUNJU, 75 YEARS,
RESIDING AT KUZHIPPARAMBIL VEEDU, VARIKANJILI
ATHUMBUMKULAM, KONNI THAZHAM MURI & VILLAGE
KOZHENCHERRY TALUK, PATHANAMTHITTA.DISTRICT.

BY ADV. SRI.S.MUHAMMED HANEEFF

RESPONDENT(S)/COMPLAINANT.:

STATE OF KERALA, REP. BY THE SUB
INSPECTOR OF POLICE, KONNI POLICE STATION
(CRIME NO. 143/2003), REP. BY THE PUBLIC, PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.

R1 BY PUBLIC PROSECUTOR SMT. SEENA RAMAKRISHNAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
21-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SKV

K.RAMAKRISHNAN, J.

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Crl. Appeal No. 1866 OF 2005

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Dated this the 21st day of December, 2015

JUDGMENT

The accused in SC 628/2004 on the file of Additional Sessions Court (Adhoc-I), Pathanamthitta is the appellant herein. The appellant was charge sheeted by the Sub Inspector of Police Konny in Crime No.143/2003 of Konni Police Station under Section 8(1) and 8(2) of the Abkari Act.

2. The case of the prosecution in nutshell was that on 18.5.2003, at about 12.30 noon, the accused was found to be in possession of 3 litres of arrack and a glass on the northern front courtyard of his house by name Koozhiparambil Veedu at Varikanjili in Athumbumkulam of Konnithazham Village for the purpose of sale in violation of the provisions of the Abkari Act and thereby he had committed the above said offence.

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

where it was taken on file as CP 65/ 2004 . After complying with the formalities, the learned Magistrate committed the case to the Sessions Court, Pathanamthitta 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 628/2004 and the same was made over to Additional Sessions Court (Adhoc-I) Pathanamthitta for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under Section 8(1) and (2) 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, PWs1 to 5 were examined and Exts.P1 to P9 and MOs1 and 2 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. He had further stated that he has been falsely implicated in the case.

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 8(1) and (2) of the Abkari Act and convicted him thereunder and sentenced him to undergo simple imprisonment for 3 months and also to pay a fine of Rs.1,00,000/–, in default to undergo simple imprisonment for two years. Set off was allowed for the period of detention already undergone under Section 428 of the Code. Aggrieved by the same the above appeal has been preferred by the appellant/accused before the court below.

5. When the appeal came up for hearing today, the counsel for the appellant submitted that the accused is no more and he died on 30.6.2008 and produced the copy of the death certificate for perusal of this court which confirms the same. However, the counsel for the appellant was prepared to argue the case on merit and so this court

decided to proceed with hearing of the appeal of the same and decided to dispose the case on merit as fine forms part of the sentence.

6. Heard Shri.R. Krishnakumar, counsel representing Shri.Muhammed Haneef for the appellant and Smt. Seena Ramakrishnan learned Public Prosecutor appearing for the state.

7. Learned counsel for the appellant submitted that only one independent witness was examined who did not support the case of the prosecution and other witnesses was not examined and the signatures of the other witnesses was also proved through the hostile witnesses and as such it cannot be said that seizure has been proved by the prosecution. Further the investigation as well as the detection was conducted by the same person and the prosecution has not proved that the chemical analysis report relates to the contraband articles alleged to have been seized from the possession of the accused and according to him, the appellant is entitled to get acquittal.

8. On the other hand, the learned counsel submitted that there was no delay in producing the article and PW1 though hostile admitted his signature in Ext.P1 as well as in the label on MO1. He had also admitted that the signature of the other witnesses also put in his presence. So the prosecution has proved the seizure and no interference is called for.

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

On 18.5.2003, at about 12.30 noon, while PW5 was conducting patrol duty along with PW2 and others, he got information that the accused was selling arrack from the house compound and immediately he went to that spot and found the accused holding MO1 kannas and MO2 glass in his hand. On seeing the police party, he tried to go away from the place. So he stopped him. On examination of the kannas, he found that it was having a capacity of 5 litres with 3 litres liquid, which on further examination they were convinced that it was arrack. He took sample from the

liquid and sealed and labelled the same containing the signatures of himself, accused and witnesses and sealed the kannas also in the same fashion and seized MOs 1 and 2 and the sample bottle as per Ext.P1 mahazar in the presence of PW1 and another. He arrested the accused and prepared Ext.P4 arrest memo and Ext.P5 inspection memo and gave intimation of his arrest to his wife. Thereafter he came to Police Station and registered Ext.P6 First Information Report as Crime No.143/2003 of Konny Police Station against the accused under Section 8(1) and (2) of the Abkari Act. He produced the accused before court along with Ext.P7 remand report and accused was remanded to custody. He produced the articles before court on the same day along with Ext.P8 property list and as directed by the Magistrate he produced the articles before the court on the next day ie. 19.5.2003. On the basis of his request along with forwarding note, sample was sent from court and Ext.P9 chemical analysis report obtained which shows that the sample contained 34.03% by volume of ethyl alcohol. He

himself has conducted the investigation. He had given Ext.P3 possession certificate showing that the accused was in possession of the property at the relevant time. The further investigation in this case was conducted by PW4, who verified investigation conducted by PW5 and completed the investigation and submitted final report.

10. PW1 is an independent witness to seizure. He had admitted his signature in Ext.P1 mahazar and also signature seen on the label and MO1 cannas. He had also admitted that apart from himself CW1 also signed the same who is the driver of jeep in which he was working as cleaner at the relevant time. But he had denied having witnessed the seizure or arrest of the accused. So his evidence is not helpful to prove the case of the prosecution. But his evidence can be relied on for the purpose of proving the fact that the seizure mahazar was prepared from the place where seizure was effected himself and CW1 had seized the same from that spot .

11. PW5 is the detecting officer in this case and PW2

is the Police Constable who accompanied him on that day. PW5 had categorically stated that while he was doing patrol duty along with PW2 and others, he got information that the accused was selling arrack from his house compound and immediately he went to that place and saw the accused standing in front of his house in the courtyard with MO1 cannas and MO2 glass and on seeing the police party, he tried to go away from the place. So they stopped him and examined MO1 cannas and found that it contained 3 litres of some liquid which on further examination by smelling and tasting he was satisfied that it was arrack. He took sample and sealed and labelled the same and sealed and labelled the MO1cannas also in the same fashion and seized the same along with MO2 glass as per Ext.P1 mahazar. He arrested the accused and prepared Ext.P4 arrest memo and also prepared Ext.P5 inspection memo. Thereafter he came to Police Station and registered the crime. The evidence given by Ext.P5 on this aspect was corroborated by the evidence of PW2. Though they were cross examined at

length, nothing was brought out to discredit their evidence on these aspects. So under the circumstances, the court below was perfectly justified in relying on the official witnesses and coming to the conclusion that the accused was arrested by PW5 along with MO1 and MO2 which according to the prosecution contained arrack. None examination of the independent witnesses is not fatal and PW1 has identified his signature and also stated that it was signed by CW1 along with him. Further detection and major portion of the investigation was conducted by same person is also not a ground for acquittal unless it is established by the accused that had caused serious prejudice to him which he had not established.

12. PW5 had categorically stated that he had produced the articles along with the property list on the same day before the court which is seen evident from Ext.P8 property list also. It is seen from the property list that the articles were produced before Magistrate at his residence on 18.5.2000 at 6.40 pm and he had opportunity to verify the

same and directed the police constable through whom it was sent to produce the same before the court on 19.5.2003. Accordingly, it was produced before court which is seen from the endorsement made on the property list. So there was no delay in producing the article.

13. Further PW5 had categorically stated that he had used the official seal used for sealing of the sample and MO1 cannas with seal after verification by the court was opened to ascertain whether the white cap was present in the cannas and it was found that it contained a white cap as described in Ext.P1 mahazar. So under the circumstances, it cannot be said that articles were produced before the court after tampering as claimed by the counsel for the appellant. Further Ext.P9 chemical analysis report shows that sample seal provided tallied with the seal seen on the bottle. So that also shows that the articles reached in the hands of chemical examiner in a tamper proof condition, that too without delay on 20.5.2003 itself with the covering letter of the Magistrate dated 19.5.2003. So there was no possibility

of any tampering. Prosecution has proved that the articles seized was arrack and the court below had rightly convicted the accused for the said offence.

14. Since the appellant is no more, it is not possible to execute the substantive sentence. So I am not going into the sufficiency of the substantive sentence or default sentence. Minimum sentence of fine of Rs.1,00,000/- alone was imposed against for the substantive sentence. Further the court below has liberty to realise the fine amount from the properties of the deceased if any available at the hands of the legal heirs in accordance with law.

So the appeal fails and the same is hereby dismissed. The order of conviction and sentence passed by the court below against the appellant is hereby confirmed. Since the appellant is no more, the substantive sentence as well as default sentence cannot be executed against him. The court below is at liberty to realise the fine amount from the estate of the deceased if any in the possession of the legal heirs in accordance with law.

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

Sd/–
K.RAMAKRISHNAN, JUDGE

SKV