

"CR"

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

FRIDAY, THE 30TH DAY OF OCTOBER

2015/8TH KARTHIKA, 1937

CRL.A.No. 1893 of 2005 ()

AGAINST THE JUDGMENT IN SC 330/2003 of ADDL. SESSIONS COURT (ADHOC)
III, TRIVANDRUM DATED 01-10-2005

AGAINST THE ORDER IN CP 73/2002 of J.M.F.C.-II, TRIVANDRUM

APPELLANT/ACCUSED:

SRI. RETNAKARAN @ CHETHA,
S/O.THAMPI, MANAKKATTUVILAKATHU VEEDU,
CHITHIRAVILASOM COLONY, VAIKKALATHU MURI
ATTIPRA VILLAGE, TRIVANDRUM.

BY ADVS.SRI.C.UNNIKRISHNAN (KOLLAM)
SRI.S.HARIKRISHNAN
SRI.P.G.HARIKUMAR

RESPONDENTS/COMPLAINANT:

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

2. THE SUB INSPECTOR OF POLICE,
THUMBA.

R1 BY PUBLIC PROSECUTOR SMT. SEENA RAMAKRISHNAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 7.10.2015,
THE COURT ON 30-10-2015 DELIVERED THE FOLLOWING:

“CR”

K. RAMAKRISHNAN, J.

.....
Crl.A.No.1893 of 2005

.....
Dated this the 30th day of October, 2015

JUDGMENT

The accused in S.C.No.330/2003 on the file of the Additional Sessions Judge, Fast Track-III, Thiruvananthpuram is the appellant herein.

2. The appellant was charge sheeted by the Additional Sub Inspector of Police, Thumba police station in Crime No.88/2001 under sections 55(a), (h) and section 8(1) of the Abkari Act.

3. The case of the prosecution in nutshell was that on 25.7.2001, at about 3.20 p.m, the accused was found to be in possession of 19 ¼ litres of arrack in a jerry can and a plastic bottle and engaged in the sale of the same and thereby he had committed the offence punishable under sections 55(a), (h) and 8(1) of the Abkari Act.

4. After investigation, final report was filed before the Judicial First Class Magistrate Court-II, Thiruvananthapuram where it was taken on file as C.P.No.73/2002. After complying with the formalities, the learned Magistrate committed the case

to the Sessions Court, Thiruvananthapuram. After committal, the case was taken on file as S.C.No.330/2003 on the file of the Sessions Court, Thiruvananthapuram and later it was made over to the Additional Sessions Court, Adhoc-III, Thiruvananthapuram for disposal.

5. 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, Pws 1 to 5 were examined and Exts.P1 to P6 and Mos 1 to 3 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 (hereinafter referred to as 'the Code') and he denied all the incriminating circumstances brought against him in the prosecution evidence. He had further stated that he had not committed any offence and he is a labourer attached to INTUC union and he has been falsely implicated in the case. 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, 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) (ought to be under section 8(1) of the Abkari Act) and convicted him thereunder and sentenced him to undergo simple imprisonment for one year and also to pay a fine of Rs.One lakh, in default to undergo simple imprisonment for three months. 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.

6. Heard counsel for the appellant and Smt. Seena Ramakrishnan, Public Prosecutor appearing for the respondent/State.

7. Counsel for the appellant submitted that the detection was made by the Additional Sub Inspector, who is not an abkari officer and as such seizure is vitiated. He had also submitted that major portion of the investigation was conducted by the Assistant Sub Inspector of Police, who is not an abkari officer and as such investigation is also vitiated. He had further submitted that there was no spot sample taken and it is not known from where and when the sample was taken and the

thondi clerk was not examined. So it cannot be said that the prosecution has proved the link between the accused and the contraband article so as to convict him for the offence alleged. He had also argued that seizure was not proper and identification of the accused as the person ran away from the place has not been established. So the court below was not justified in convicting the appellant for the offence alleged and he is entitled to get acquittal. He had relied on the decisions reported in ***Joy v. State of Kerala*** (2010 (3) KLT 20), ***Subash v.State of Kerala*** (2008 (2) KLT 1047), ***Saji @ Kochumon v. State of Kerala*** (2010 (3) KLT 471), ***Sasidharan v. State of Kerala*** (2012 (2) KLT 392), ***Narayanankutty v.State of Kerala*** (2015 (1) KHC 702) and ***Subrahmaniyan v. State of Kerala*** (2010(2) KLT 470) in support of his case.

8. On the other hand, learned Public Prosecutor submitted that the evidence will go to show that he was known to the police officials and he was accused in other cases as well. Further, articles were produced before court without delay and final report was filed by the Additional Sub Inspect, who is an equivalent officer of Sub Inspector, entitled to exercise all the powers of Sub Inspector. So according to the learned Public

Prosecutor, the court below was perfectly justified in convicting the appellant for the offence alleged.

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

On 25.7.2001, at about 3.20 p.m, while PW4 was working as Additional Sub Inspector of Police, Thumba police station, he along with PW3 and others was doing patrol duty along Kulathoor-Pullukadu area. When he reached near the compound of VSSC, he got information that, in that compound where Kerala State Electricity Board's office is situated on its back side, one Ratnakaran was conducting business in arrack and immediately he went to that place along with the party and on seeing the police party, that person found there with plastic bottle in his hand had abandoned the plastic bottle near the kannas kept there and escaped from there by crossing Parvathy Puthanar. Thereafter they examined the contents of the kannas and also contents in the bottle and they were satisfied that it was arrack. MO1 kannas contained 18 litres while MO2 contained 1 ¼ litres of arrack and a glass was found in that place, which was also having the smell of arrack. He had sealed the kannas and the bottle and seized the same along with the

glass as per Ext.P1 mahazer in the presence of Pws 1 and 2. On enquiry it was revealed that the person, who ran away from the place was Ratnakaran, who is the accused in the case. Thereafter he came to the police station and registered Ext.P4 First Information Report as Crime No.88/2001 of Thumba police station under sections 55(a), (h) and 8(1) of the Abkari Act against the accused. Thereafter he prepared Ext.P5 thondi list and produced articles before court. Further investigation was conducted by PW5, the Sub Inspector of police. He collected Ext.P6 chemical analysis report and produced the same before court. He verified the investigation conducted by his predecessor and completed investigation and submitted final report.

10. Pws 1 and 2 were the independent witnesses to the seizure. Though PW1 admitted his signature in Ext.P1, he had denied having seen the seizure or the incident. He had stated that he knew the accused. He had categorically stated that he did not see the accused running away from the place.

11. PW2 had admitted that he knew the accused, but he did not see the incident or seizing any article. But he had admitted his signature in Ext.P1. He denied having stated in

Ext.P3 when he questioned by the investigating officer. PW1 also denied having stated in Ext.P2 when he was questioned by the investigating officer. So it is clear that they were now trying to help the accused and that was the reason why they did not support the case of the prosecution. Then the available evidence is that of Pws 3 and 4, the police officer who accompanied PW4, the detecting officer and the detecting officer respectively. PW4 had categorically stated that he was doing patrol duty along with PW3 and at that time he got information that one person by name Ratnakaran was selling arrack from behind the Kerala State Electricity Board office in VSSC compound. Immediately they went to that place and at that time they saw a person holding a bottle standing there and on seeing the police party, he abandoned the bottle near the cannas kept there and escaped from there by crossing Parvathy Puthanar. He had stated that he knew the accused as he was accused in other cases. But that fact was not mentioned in the First Information Report or in Ext.P1 mahazer. It was brought out in the evidence of PW4 that he came to know about the person ran away from the place was Retnakaran from the persons gathered there. The evidence of PW4 was corroborated by the evidence of

PW3, the accompanying officer. He had also stated that he could identify the accused as he was accused in other cases. But he had also admitted that, that fact was not disclosed to the investigating officer when he was questioned. Neither the investigating officer nor PW4 had a case that the accused was arrested in connection with this case and later they identified him. The fact that they could gather identity of the person ran away from the place from the persons gathered itself shows that they have no idea about the person, who ran away from the place, except that they have got only information that one Ratnakaran was selling arrack. The fact that he is accused in other cases and he was known to them was not mentioned in Ext.P1 mahazer as well. So the evidence of Pws 3 and 4 regarding identity of the accused as the person who ran away from the place cannot be safely relied so as to prove the identity of the accused as the person ran away from the place. The court below had come to the conclusion that since Pws 3 and 4 had stated that they knew him and he was accused in other cases, there is nothing to disbelieve their evidence regarding the identity is not sustainable in law in view of the fact that those aspects were not mentioned in Ext.P1 and the

evidence of Pws 3 and 4 and also details of the identity of the accused mentioned in Ext.P1 mahazer will go to show that they could collect the particulars of the person ran away from the place from the persons gathered there and it was on that basis that they came to the conclusion that the person ran away from the place was the accused. So the finding of the court below that the prosecution has proved beyond reasonable doubt regarding the identity of the person ran away from the place was accused and conviction based on that basis is unsustainable in law and the same is liable to be set aside.

12.Further in this case there was a contention raised by the counsel for the appellant that detection was made by the Additional Sub Inspector of police, who is not an abkari officer. It is true that in the decision reported in **Joy's case** (cited supra), it has been observed that unless the Assistant Sub Inspector of police was holding charge of the Station House Officer he cannot be deemed to be a competent officer. The same view was reiterated in the decision reported in **Subash's case** (cited supra), where a Division Bench of this Court has held that if final report was filed by the Assistant Sub Inspector of Police, it is not valid in the eye of law and cognizance

cannot be taken on that basis. In the decision reported in ***Saji's case*** (cited supra), this Court has held that Sub Inspector of Police authorized to act as abkari officer can exercise his jurisdiction only within the territorial limits of his police station and final report laid by another Sub Inspector who has not having jurisdiction over that area is illegal. In the decision reported in ***Sasidharan v. State of Kerala*** (2012 (2)KLT 392) it has been observed that till 8.5.2009 when alone as per Government notification SRO 361/2009 Assistant Excise Inspectors were authorized to exercise powers of the abkari officer and before that they cannot be deemed to be an abkari officer and detention made by them was not legal. The same view has been reiterated in the decision reported in ***Subrahmaniyan' case*** (cited supra). In all those cases it has been held that either the Assistant Excise Inspector or Assistant Sub Inspector were not deemed to be persons of and above the rank of Excise Inspector or Sub Inspector of Police and they are inferior to the Excise Inspector and Sub Inspectors respectively and detection or investigation made by them was not legal. None of these decisions were authoritative for the purpose of coming to the conclusion that Additional Sub

Inspector is not an abkari officer.

13. In the decision reported in ***Sasi v. State of Kerala*** (2001 (3) KLT 396), a Division Bench of this Court had occasion to consider the question as to whether additional Sub Inspector of Police will be deemed to be a Sub Inspector of Police, an empowered officer under section 42 of the Narcotic Drugs and Psychotropics Substances Act and held that Additional Sub Inspectors are equivalent to the rank of Sub Inspector of Police mentioned in GO(MS)No. 137/85/TD published in SRO No.1516/85 dated 8.11.1985 by which all Police officers in police department of and above the rank of Sub Inspector of Police and all officers of the Excise Department of and above the rank of Excise Inspectors were empowered to act under section 42 of the NDPS Act. So the Division Bench of this Court has held that Additional Sub Inspectors are also equivalent to the Sub Inspector of Police mentioned in the notification to exercise the power under that Act. The same principle can be extended to abkari cases as well as the notification issued by the Government only says that officers of Police Department of and above the rank of Sub Inspector of Police were vested with the power of abkari

officer to exercise within their respective jurisdiction as per SRO No.321/1996. So it is not necessary that he must be a Station House Officer for that purpose and if he is an abkari officer, he can conduct search and effect seizure and arrest and conduct investigation as well. In this case in view of the dictum laid down in the above decisions, Additional Sub Inspector is also a Sub Inspector fall under the category of and above the rank of Sub Inspector entitled to exercise power of an abkari officer and so the submission made by the counsel for the appellant that seizure effected by the Additional Sub Inspector is not valid, has no substance and the same is liable to be rejected.

14. It is true that the evidence adduced on the side of the prosecution proved that some contraband articles were seized. But it is settled law that, that alone is not sufficient to prove the guilt of the accused unless it is proved by the prosecution the link between the accused and the contraband article seized. Further, it has to be proved by the prosecution that chemical analysis report relates to representative sample said to have been taken from the contraband article alleged to have been seized from the possession of the accused. Unless

this is proved, it cannot be said that the prosecution has succeeded in bringing home the complexity of the accused in the commission of the crime. In this case, there is no spot sample taken and there is no evidence adduced as to from where the sample was taken, who had taken the sample etc.

15. In the decision reported in ***Sasidharan v. State of Kerala*** (2007 (1) KLT 720) it has been observed that:

"Prosecution has a duty to prove that it was the sample taken from the contraband liquor seized from the possession of the accused which had reached the hands of the Chemical Examiner in a fool proof condition. Without the link evidence of actual sampling by the concerned clerk of the court by drawing sample from the can and sending the same in a sealed packet to the Chemical Examiner with a specimen seal sent separately for tamper proof despatch, the Prosecution cannot be held to have brought home the offence against the appellant. The prosecution had a duty to prove that it was the sample taken from the contraband liquor seized from the accused which had reached the hands of the Chemical Examiner in a fool proof condition".

In the same decision it has been observed that"

"Committing Magistrate have to take care that contemporary proceedings evidencing the drawing of sample and sending the same to the Chemical Examiner in a tamper-proof condition are recorded in the proceedings before court.

Sessions Judges trying such cases also should ensure that the concerned member of the staff, who had drawn the sample and despatched the same to the Chemical Examiner duly packed and sealed under the covering letter of the Magistrate is examined before court during trial. The Public Prosecutor in charge of the case also had a duty to file an additional witness-list for examining the thondy section clerk (property clerk) concerned so as to establish the nexus between the contraband substance and the accused"

16. The same view has been reiterated in the decision reported in ***Nalinakshan v. State of Kerala*** (2012 (4) KHC 464). In this case there is no evidence adduced from where the sample was taken. The thondi clerk who alleged to have taken the sample was not examined as well. Under the circumstances, it cannot be said that the prosecution has proved beyond reasonable doubt the link between the accused and the contraband article and the chemical analysis report relates to representative sample said to have been taken from the contraband article seized. These aspects were not properly considered by the court below while appreciating the evidence and before coming to the conclusion that prosecution has proved beyond reasonable doubt identity of the accused and

also possession of arrack with the accused and consequential conviction entered by the court below 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 my finding that the appellant is entitled to get acquittal, the 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. 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 stands cancelled. The trial court is directed to refund the fine amount, if any, paid by the appellant to him on making necessary application for that purpose.

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

