

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

MONDAY, THE 28TH DAY OF SEPTEMBER 2015/6TH ASWINA, 1937

CRL.A.No. 1623 of 2009 ()

AGAINST THE JUDGMENT IN SC 1407/2002 of SPECIAL COURT FOR ABKARI ACT
CASES, KOTTARAKKARA DATED 24-07-2009

APPELLANT/ACCUSED:

RAJENDRAN NAIR S/o.NARAYANAN NAIR
RADHA BHAVAN, THOLICODE MURI, PUNALUR VILLAGE
KOLLAM DISTRICT.

BY ADVS.SRI.K.HARIDAS
SRI.VISHNUDAS H.

RESPONDENT/STATE:

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

BY PUBLIC PROSECUTOR: SMT. S HYMA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 01-09-2015,
THE COURT ON 28.09.2015 DELIVERED THE FOLLOWING:

SUNIL THOMAS, J.

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Crl.A.No.1623 of 2009

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Dated this the 28th day of September, 2015

JUDGMENT

The sole accused who stands convicted for offence punishable under Section 55(a) of the Abkari Act, by judgment dated 24.07.2009 in S.C.No.1407 of 2002 of the Additional Sessions Court (Abkari Cases), Kottarakkara is the appellant herein.

2. The prosecution case is that on 30.04.2000 at about 10.30a.m., the accused was intercepted with a can containing 19 litres of toddy mixed with spirit along with a drinking glass allegedly for the purpose of sale. After drawing samples from it and preparing contemporaneous documents, he was arrested and crime registered. He was produced before the magistrate court. After completion of investigation, a crime was registered and the final report was laid for offences punishable under Section 55(a) and 55(i) of the Abkari Act. Before the learned Sessions Judge, the accused pleaded not guilty and faced the trial. On the side of the prosecution, PWs.1 to 4 were examined and Exts.P1 to P5 were marked. MO1 was identified. On the side of the accused, DW1 was examined.

3. The court below, on an evaluation of all available inputs concluded that the accused is guilty, convicted and sentenced him to undergo simple imprisonment for one year and to pay a fine of

Rs.1,00,000/- and in default, to undergo simple imprisonment for three months for offence punishable under Section 55(a) of the Abkari Act.

4. Aggrieved by the conviction and sentence, accused has preferred this appeal. Heard both sides and examined the records.

5. PWs.1 and 2 were claimed to be independent witnesses by the prosecution. However, both of them turned hostile and did not support the prosecution case in any manner. PW1 admitted that he has signed on Ext.P1. PW2 claimed that he had signed on a white paper. However, both of them did not deny the signatures. In the absence of anything to doubt or any specific allegation that the police have coerced or threatened the witnesses to sign documents, I am not inclined to believe the version of PW2 and it is only to be held that they have voluntarily and knowingly signed Ext.P1 seizure mahazar.

6. PW3 is the detecting officer who was the Sub Inspector of Police of the Punalur police station. PW4 was the ASI of the same police station during the relevant time. Both the witnesses deposed uniformly in relation to the prosecution case. They deposed that on getting information that the accused was selling toddy laced with spirit, both of them went to the spot and intercepted the accused. Both the witnesses deposed that at the

time of interception, accused was holding a drinking glass with the can placed nearby. On tasting the contents of the can, it was found to be toddy laced with spirit. According to the witnesses, the total quantity contained in the can was about 19 litres. They deposed in terms of drawing of the sample, preparation of the contemporaneous documents, labelling and arrest of the accused. They also deposed about the details of the entire process.

7. Ext.P1 is the seizure mahazar and Ext.P2 is the custody memo. The contents of the above documents are in tune with the versions spoken to by both the witnesses. Even though, PWs.3 and 4 were cross examined, touching upon the defence set up by the accused, no material contradiction or omission has been brought out. The evidence uniformly tendered by PWs.3 and 4 are corroborated by Exts.P1 and P2.

8. PW3 himself was the investigating officer. Ext.P3 is the FIR and Ext.P4 is form 151A. Ext.P5 is the chemical analysis report which showed that the first sample contained 28.70% Ethyl Alcohol and sample 2 contained 29.36% Ethyl Alcohol. The available material indicate that the samples drawn at the spot was sealed, taken to the police station and without considerable delay, produced before the magistrate. It was thereafter forwarded to the chemical analysis lab. Ext.P5 indicates that the sample was found

to be properly sealed, the seal remained in tact and tallied with the samples.

9. The defence as revealed from the trend of cross examination, reply given by the accused to Section 313 Cr.P.C questioning and through the oral of the defence witness DW1, was that the case was a foisted one due to other reasons. DW1 deposed that he was the Municipal Councilor and that the accused was earlier running a grocery shop in the property of one Mohanan Pillai. Mohanan Pillai along with toddy shop contractor had constructed a toddy shop in the property. The shop which was in possession of the accused had been found to be an obstruction in the business of the toddy shop contractor and under his instigation, the accused was directed to vacate the building. Since accused refused to vacate, the accused was summoned to the police station on three occasions and on the 4th occasion, he was called to the police station, detained there and thereafter, the present case was allegedly foisted on him. It was claimed that DW1 had intervened in the above dispute.

10. Hence, the essential contention of the accused was that the case was foisted on him, due to previous animosity. In this background, it was stated that there was a delay of 9 days in producing of the contraband articles before the Court. It was

further alleged that during the intervening period, the toddy laced with spirit supplied by the toddy shop contractor was procured and set up as a material object to substantiate a false case. It is true that though the accused was allegedly arrested on 13.04.2000, the contraband was produced in Court only on 09.05.2000. Though PW3 stated that it was in his safe custody, he did not explain the reason for the delay. It was also suggested that the shop room was rented by the accused and a false case was set up at the instance of the toddy shop contractor.

11. Learned counsel contended that the charge framed against the accused was under Sections 55(a) and 55 (i) of the Kerala Abkari Act. He was ultimately found guilty under Section 55(a) of the Abkari Act. Learned counsel contended that export, import and transport or such other acts mentioned in Section 55(a) is a sine quo non for initiating proceedings under Section 55(a). It was contended that the offence under Section 55(a) can be attracted only when the prosecution was in a position to specifically allege and prove that the contraband articles found in possession of the accused were held in connection with the export, import, transport or transit. If prosecution fails to prove these ingredients, the offence under Section 55(a) will not lie, goes the contention of learned counsel. Learned counsel also relied on

Sabu Vs. State of Kerala (2007(4) KLT 169) wherein, the above view was taken by this Court. However, in **Jose Vs. State of Kerala (2007(2) KLT 202)**, it was held by this Court that the transport of illicit arrack is punishable under any one of three sections namely, Section 8, 55(a) and 58 of the Abkari Act. However, the Court also took the view that to constitute an offence under Section 55(a), prosecution should specifically allege and prove that the possession was in connection with export, import, transport or transit.

12. This view was reiterated again in **Bhaskaran Vs. State of Kerala (2013(3) KHC 258)**. It was held that since the prosecution had no case that the appellant therein was found in possession of the liquor in the course of any import, export, transport or transit, applying the dictum laid down in **Surendran Vs. Excise Inspector (2004 KHC 72)** and **Josekutty Vs. State of Kerala (2013(1) KHC 241)**, it is clear that offence will not come under Section 55(a) of the Abkari Act. Hence, conviction herein, under Section 55(a) is not sustainable.

13. In the above circumstance, learned counsel for the accused further contended that Section 58 is not a minor offence of Section 55 and consequently, if offence under Section 55 is not made out, in the absence of any charge being framed under Section

58, no conviction is punishable under Section 58 of the Abkari Act. This contention seems to be not sustainable in the light of decision in Bhaskaran's case cited supra wherein, it was held that the facts proved through the evidence of prosecution witnesses clearly spelt out an offence under Section 58 of the Abkari Act, it was held that when the contraband was seized from the possession of the appellant and further fact that appellant was aware that the contraband was unlawfully manufactured is explicit from the circumstance, a mere presumption will not serve any purpose. The Court held that in such case, a conviction under Section 55(a) of the Abkari Act has necessarily to be altered to a conviction under Section 58 of the Abkari Act. The Court further held that to constitute an ingredient under Section 58, it is essential to prove that there was conscious possession of the contraband. The Court held that arrack was banned in the State of Kerala. While mentioning arrack, it need not be specifically mentioned that arrack is illicit and if arrack is found in possession of any person, or arrack is seized, it follows that it was procured through illicit means or manufactured unlawfully, for which no further evidence is required in the light of the clear ban of arrack.

14. Applying the above principle in the case at hand, there is a slight factual distinction. In Bhaskaran's case, contraband

recovered from the accused was spirit. Conviction was essentially based on the concept that since the accused knew that it was spirit and arrack was banned in Kerala, mere possession of the arrack lead to a explicit finding that it was a conscious possession. In the case at hand, accused was found to be in possession of toddy. There is an allegation that it was laced with spirit. Toddy is not banned in Kerala. The question whether the accused was aware of the fact that the toddy was laced with spirit is a matter which requires specific allegation and concrete proof, unlike a case wherein the accused was found in possession of the arrack. It is evident that only a chemical analysis report established that toddy was mixed with spirit, which normally in the course of business may not be known to a person.

15. In this regard, PW4 in his evidence had stated that when the police party approached the accused, on enquiry, he is stated to have replied that he was selling toddy mixed with arrack. However, no such version is spoken to by the detecting officer. Even Ext.P1 does not indicate that accused had disclosed that he was selling toddy mixed with arrack. Hence, the version of PW4 that the accused disclosed that he was selling toddy mixed with arrack can only be a afterthought or an embellishment of the witnesses. Something which is not spoken to by the detecting

officer as well as not disclosed from the contemporaneous documents, cannot be deemed to be a fact which can be relied on especially against the accused.

16. In the absence of an allegation by the prosecution at the initial stage indicating that the accused was in conscious possession of toddy mixed with arrack, no purpose will be served by remanding the case to the court below for a fresh consideration, at this length of time. The only option hence available is to acquit the accused of the charges levelled against him. In the light of the above, it is only to be held that the prosecution has not established the offence alleged against the accused. Accused is entitled for acquittal.

In the result, the appeal is allowed. The conviction and sentence imposed by the court below are set aside and the accused is acquitted. The bail bond executed by him shall stand discharged.

Sd/-

SUNIL THOMAS
Judge

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