

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

FRIDAY, THE 18TH DAY OF DECEMBER 2015/27TH AGRAHAYANA, 1937

CRL.A.No. 1914 of 2005 ()

AGAINST THE JUDGMENT IN SC 2018/2001 of ADDITIONAL SESSIONS COURT, FAST
TRACK (ADHOC)NO.II, THIRUVANANTHAPURAM DATED 20-10-2005

AGAINST THE ORDER IN CP 42/2001 of J.M.F.C., VARKALA
APPELLANT/ACCUSED:

VASANTHA, D/O.PARUKKUTTY,
THONIPPURARODUVILAVEEDU,
PUTHUKONAM VILLAGE, KOLLAM.

BY ADVS.SRI.G.P.SHINOD
SRI.RAM MOHAN.G.
SRI.MANU V.

RESPONDENT/COMPLAINANT:

STATE OF KERALA, REPRESENTED BY
ITS PUBLIC PROSECUTOR AT HIGH COURT OF KERALA.

BY PUBLIC PROSECUTOR SRI.JIBU P.THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 18-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. RAMAKRISHNAN, J.

.....
Crl.A.No.1914 of 2005
.....

Dated this the 18th day of December, 2015

JUDGMENT

The accused in S.C.No.2018/2001 on the file of the Additional Sessions Court, Fast Track (Adhoc)-II, Thiruvananthapuram is the appellant herein. The appellant was charge sheeted by the Excise Inspector, Varkala excise range in Crime No.24/1999 of that excise range under sections 8 (1) and (2) of the Abkari Act.

2. The case of the prosecution in nutshell was that on 15.12.1999, at about 7 a.m, the accused was found to be in possession of 2.5 litres of arrack near Thonnipara Public Health Centre and found transiting the same along the public road in violation of the provisions of the Abkari Act and thereby she had committed the above said offence.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court, Varkala where it was taken on file as C.P.No.42/2001. After complying with the formalities, the learned Magistrate committed the case to Sessions Court, Thiruvananthapuram under section 209 of the Code of Criminal Procedure (hereinafter referred to as 'the

Code'). After committal, the case was taken on file as S.C.No.2018/2001 on the file of the Sessions Court, Thiruvananthapuram and it was originally made over to the Assistant Sessions Court, Attingal and thereafter it was withdrawn and made over to Additional Sessions Court, Fast Track (Adhoc)-II, Thiruvananthapuram for disposal by the Sessions Judge.

4. When the accused appeared before the court below, after hearing both sides, charge under sections 8(1) and (2) of the Abkari Act was framed and the same was read over and explained to her and she pleaded not guilty. In order to prove the case of the prosecution, Pws 1 to 5 were examined and Exts.P1 to P7 and MO1 were marked on their side. After closure of the prosecution evidence, the accused was questioned under section 313 of the Code and she denied all the incriminating circumstances brought against her in the prosecution evidence. She had further stated that no article was seized from her possession. Due to a false complaint filed by the nearby shop owners, she has been falsely implicated in the case by the excise officials. Since evidence in this case did not warrant an acquittal under section 232 of the

Code, the accused was called upon to enter on her defence. DW1 was examined on her side to prove her case. After considering the evidence on record, the court below found the appellant guilty under sections 8(1) read with section 8(2) of the Abkari Act, convicted her thereunder and sentenced her to undergo rigorous imprisonment for two years and also 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 under section 428 of the Code. Aggrieved by the same, the present appeal has been preferred by the appellant, accused before the court below.

5. Heard Sri. Ajith G.A, counsel representing Sri. Shinod G, counsel appearing for the appellant and Sri. Jibu P.Thomas, learned Public Prosecutor appearing for the State.

6. Learned counsel for the appellant submitted that the court below had not properly appreciated the evidence of DW1 to prove false implication of the accused in this case. Further, there was no spot sample taken and there is no evidence adduced on the side of the prosecution as to from where the sample was taken, when it was taken, etc so as to connect the chemical analysis report to the sample said to have been taken

from the article alleged to have been seized from the possession of the accused and in the absence of such evidence, it cannot be said that the prosecution has proved the case against the accused beyond reasonable doubt. Learned counsel has relied on the decision reported in **Sasidharan v. State of Kerala** (2007 (1) KLT 720) in support of his case.

7. On the other hand, learned Public Prosecutor submitted that the evidence of Pws 4 and 5 will go to show that the accused was arrested along with the contraband articles and she was produced before court and the articles were also produced on the same day and there is no possibility of any tampering and non examination of the thondi clerk is not fatal in this case. According to the learned Pubic Prosecutor, the court below was perfectly justified in convicting the appellant for the offence alleged.

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

On 15.12.1999, at about 7 a.m, PW3-the Preventive Officer along PW4, another Preventive Officer, and excise party were doing patrol duty and when they reached in front of the Public Health Centre, Thonnipara, they saw the accused

coming with a cannas in her hand and on seeing the excise party, she tried to go away from the place. So they stopped her and examined the contents of the cannas and satisfied that it was arrack. So they sealed and labelled the cannas containing the signature of the accused, witnesses and himself and seized the same as per Ext.P1 mahazer in the presence of PW1 and another. He arrested the accused and prepared Ext.P3 arrest memo. He came to the excise office and produced the accused along with the contraband article before PW5, who registered Ext.P4 occurrence report as Crime No.24/1999 of Varkala excise range against the accused under section 8 (1) read with 8(2) of the Abkari Act. He produced the accused before court along with the remand report. He produced the contraband article seized before court along with Ext.P5 property list. He sent Ext.P6 forwarding note and the sample was sent from court and Ext.P2 chemical analysis report obtained. He questioned the witnesses and recorded their statements. PW2 verified the investigation conducted by PW5 and collected Ext.P2 chemical analysis report and produced the same in court. He completed the investigation and submitted final report.

9. PW1 is the alleged seizure witness. He had denied having seen the seizure. Though he had admitted his signature in Ext.P1 mahazer and also labels seen on MO1 cannas, his evidence is not helpful to prove either the arrest of the accused or seizure of the contraband article. Then the evidence available is that of Pws 3 and 4. PW3 is the detecting officer and PW4 is the officer who accompanied PW3. PW3 was working as Preventive Officer of Varkala excise range at that time and he was doing patrol duty along with PW4 and others. When they reached near the place of occurrence, they saw the accused coming with MO1 cannas in her hand and on seeing them, she tried to go away from the place. So PW3 stopped her and on examination of MO1 cannas found that it contained 2.5 litres of some liquid. On further examination, he was satisfied that it was arrack. He arrested the accused and sealed the cannas and affixed label containing signature of himself, accused and the witnesses and seized the same as per Ext.P1 mahazer. He prepared Ext.P3 arrest memo and came to the excise office along with the accused and the contraband articles seized and produced the accused and the contraband article seized along with the documents prepared before PW5.

The evidence of PW3 was corroborated by the evidence of PW4. Though they were cross examined at length, nothing was brought out to discredit their evidence on this aspect.

10. DW1 was examined on the side of the accused to prove that no article was seized from the possession of the accused. But she was taken into custody by the excise officials and falsely implicated in this case. According to him, they were working together and on that day, while they were going for taking tea, an excise vehicle was stopped near public health centre and they asked the accused to come near them and when she went there, she was asked to get into the vehicle and an excise official was holding a cannabis in his hand and when he asked why she is being taken, they did not answer and they had taken the accused. In the cross examination he told that on next day he met the accused and enquired about the same. But that could not be probable as she was in judicial custody for 18 days after she was taken into custody by the excise officials. Further, the evidence of DW1 will go to show that he is trying to help the accused and there was no possibility for him to be present at the place of occurrence and as such, the court below had rightly discarded his evidence. Though Pws 3 and 4

were cross examined at length, nothing was brought out to discredit their evidence on the question of arrest of the accused and seizure of kannas said to be containing arrack. So the court below was perfectly justified in accepting the evidence of Pws 3 and 4 and rightly came to the conclusion that she was arrested by PW3 along with a kannas said to be containing arrack.

11. Mere seizure of a kannas with some liquid and arrest of the accused alone is not sufficient to convict the accused for the offence alleged. It must be further proved by the prosecution 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 article alleged to have been seized from the possession of the accused. In this case, it is seen from Ext.P5 property list that the articles reached court on the same day of seizure. But in Ext.P1, nature of seal used for sealing the kannas was not mentioned. Further, even in Ext.P6 forwarding note, the specimen seal impression used for sealing the kannas was not produced. Neither PW3 nor PW5 had a case that along with the property list, the specimen seal impression of the seal used for sealing

the cannas was produced so as to verify the cannas by the court. It will be seen from Ext.P5 property list that, it was not even mentioned that it was sealed and labelled though Pws 3 and 4 had stated that it was sealed and labelled and it contained a label on the same. So, under the circumstances, it cannot be said that the article was produced in court in the same fashion in which it was seized. Further, no spot sample was taken from the contraband article alleged to have been seized from the possession of the accused. Further, it is not known who had taken the sample, from where it was taken, at whose request it was taken etc. Neither PW3 nor PW4 had stated that they had made any request before court for taking sample and it was on that basis that the sample was taken from court and it was sent from court. Such circumstance was considered by this Court in the decision reported in **Sasidharan's case** (cited supra) and it has been observed as follows:

"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"

12. It is clear from the above decision that if sample is taken from court, there is a duty cast on the prosecution to examine the thondi clerk of the concerned court. who had taken the sample, packed and sent the same for chemical analysis so as to

prove that it was taken under orders of the Magistrate and it was properly packed and sent. Such procedure was not adopted in this case. So in the absence of such evidence, it cannot be said that the prosecution has succeeded in bring home the complexity of the accused in the commission of the crime and proved link between the accused and the contraband article seized so as to convict her for possession of the contraband article. The court below had not considered this aspect before coming to the conclusion that the prosecution has proved beyond reasonable doubt that the accused was found to be in possession of arrack and consequential conviction entered by the court below for the said offence is unsustainable in law and the same is liable to be set aside. The accused is entitled to get acquittal of the charge levelled against her giving her the benefit of doubt. In view of the finding that the appellant is entitled to get acquittal, the sentence imposed 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 8(1) read with 8(2) of the Abkari Act are hereby set aside. The appellant is

acquitted of the charge levelled against her giving her the benefit of doubt. She is set at liberty. The bail bond executed by her will stand cancelled. The court below is directed to refund the fine amount, if any, remitted by the appellant to her on making necessary application in that regard.

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

Sd/-

K. RAMAKRISHNAN, JUDGE.

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P.S to Judge