

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

WEDNESDAY, THE 30TH DAY OF SEPTEMBER 2015/8TH ASWINA, 1937

CRL.A.No. 2000 of 2005 ()

SC 929/2000 of SPECIAL COURT FOR ABKARI ACT CASES, KOTTARAKKARA

APPELLANT(S):

**OMANA, D/O KOCHALI
CANAL PURAMBOKE, NEAR JANATHA RUBBER, ESTATE
PATHIRICKAL MURI, PATHANAPURAM VILLAGE.**

BY ADV. SRI.S.A.SAJU

RESPONDENT(S):

**STATE OF KERALA
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.**

R1 BY PUBLIC PROSECUTOR SMT. SEENA RAMAKRISHNAN

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 30-09-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

SKV

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K.RAMAKRISHNAN, J.

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Crl. Appeal No.2000 OF 2005

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Dated this the 30th day of September, 2015

JUDGMENT

The accused in SC No.1929/2000 on the file of the Additional Sessions Court for Abkari Cases, Kottarakkara is the appellant herein. The appellant was charge sheeted by the Sub Inspector of Police, Pathanapuram Police Station in Crime No.310/1999 of Pathanapuram Police Station under Section 55 (a) and (i) of the Abkari Act.

2. The case of the prosecution in nutshell was that on 25.9.1999, at about 2.30 pm, the accused was found to be in possession of 1 litre of arrack in a 5 litre jerry can with a glass in her hand on the eastern ridge of Cherannoor paddy fields Pathirickal for the purpose of sale in violation of the provisions of the Abkari Act and thereby she had committed the offence punishable under Sections 55(a) and (i) of the Abkari Act (ought to be under Section 8(1) and 8(2) of the Abkari Act).

3. After investigation, final report was filed before the Judicial First Class Magistrate's Court-III, Punaloor where it was taken on file as CP No.103/1999. After complying with the formalities, the learned Magistrate committed the case to the Sessions Court, Kollam under Section 209 of the Code of Criminal Procedure (hereinafter referred to as the Code). After committal, the Sessions Court took cognizance of the case as SC No.929/2000 and it was originally made over to Assistant Sessions Court Kottarakkara for disposal. While that case was pending before that court, when the accused appeared before that court, after hearing both sides, Assistant Sessions Judge Kottarakkara framed charge under Section 55(a) and (i) of the Abkari Act and the same was read over and explained to her and she pleaded not guilty. Thereafter the case was withdrawn by the Sessions Judge, Kollam and made over to Additional Sessions Court, (Abkari Cases) Kottarakkara, when that court was established to try Abkari cases as a special court for disposal.

4. In order to prove the case of the prosecution, PWs 1 to 6 were examined and Exts. P1 to P5 and MO1 and MO2 were marked on the side of the prosecution. 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 she had not committed any offence and she was called to the Police Station and 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 her defence, but no defence evidence was adduced on her side. 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 her thereunder and sentenced her to undergo simple imprisonment for two years and also pay a fine of Rs.1,00,000/–, in default to undergo simple imprisonment for six months under Section 55(a) of the Abkari Act and no separate sentence was

awarded for the offence under Section 55(i) 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 S.A. Saju counsel appearing for the appellant and Smt. Seena Ramakrishnan learned Public Prosecutor appearing for the State.

6. The counsel for the appellant submitted that in this case seizure, arrest and investigation were conducted by the Assistant Sub Inspector of Police, who is not an Abkari Officer and entire seizure is vitiated and as such no conviction can be based on such illegal seizure. He had also argued that there was delay in producing the article and it was not properly explained and as such the link between the accused and the contraband article alleged to have been seized were not established. So the order of conviction entered by the court below is not sustainable and the accused is entitled to get acquittal. He had relied on the decision reported in Sabu v State of Kerala [2007 (4) KLT 169] and Subash v State of Kerala [2008 (2) KLT 1047],

Subramaniyan v State of Kerala [2010 (2) KLT 470] and Ravi v State of Keala [2011 (3) KHC 121] in support of his submissions.

7. On the other hand, the learned Public Prosecutor submitted that the evidence of PWs 5 and 6 will go to show that he was in charge of the Police Station and in that capacity, he detected the crime. So the detection and seizure are proper. The delay has been properly explained and no prejudice has been caused to the accused on account of the same. So according to the learned Pubic Prosecutor, court below was perfectly justified in convicting the appellant for the offence alleged and no interference is called for.

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

PW5 was working as Assistant Sub Inspector of Police, Pathanapuram Police Station at the relevant time. On 25.9.1999 while he was in station, he got information that the accused was engaged in sale of arrack and immediately

he along with PW3 Police Constable and PW4 Women Police Constable who was requisitioned for the purpose of arrest while she was working in the office of the Deputy Superintendent of Police, Punaloor and thereafter they went to the spot and found the accused standing there with MO1 kannas in her hand with MO2 glass. On seeing the police party, she tried to go away from the place. So PW5 stopped her and on verification of MO1 kannas, it contained some liquid having a quantity of one litre. On verification of the contents of the kannas, he was satisfied that it was arrack. So he arrested the accused with a help of PW4, woman police officer and prepared Ext.P3 custody memo. Thereafter he had taken sample from the contents of the kannas and sealed and labelled the same and thereafter sealed the kannas also and seized MO1 kannas and the sample bottle and MO2 glass as per Ext.P1 mahazar in the presence of PWs 1 and 2. Thereafter he came to Police Station along with the accused and the contraband articles seized and registered Ext.P2 First Information Report as

Crime No.310/1999 of Pathanapuram Police Station against the accused under Section 55(a) and (i) of the Abkari Act. He had conducted the investigation. He prepared Ext.P4 property list and produced the articles before the court. He produced the accused along with remand report. On the basis of the requisition given by him, the sample was sent for analysis from court and Ext.P5 chemical analysis report obtained, which shows that the sample contained 27.23% by volume ethyl alcohol. The investigation conducted by PW5 was verified by PW6, Sub inspector of Police and final report was filed by him.

9. PWs 1 and 2 were independent witnesses to the seizure. Though they admitted their signatures in Ext.P1, they did not support the seizure or arrest of the accused. They have further 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 did not support the case of the prosecution.

10. Then the evidence is that of PWs 3 to 5 of which

PW5 is the detecting cum investigating officer to prove the seizure and arrest of the accused. PW5 had categorically stated that while he was in Police Station, he got information that the accused was engaged in sale of arrack. Since the accused is a lady, he got the help of a woman police constable from the Office of the Deputy Superintendent of Police and accordingly PW4 was deputed for that purpose. Thereafter he along with PW3 and PW4 went to that place and saw the accused standing there with MO1 kannas and MO2 glass in her hand and on seeing the police party, she tried to go away from the place. So they stopped her. PW5 verified the contents of the kannas and satisfied that it contained one litre of arrack. He arrested the accused with the help of PW4 Woman Police Constable and prepared Ext.P3 arrest memo. Thereafter he had taken sample and sealed the same and sealed the kannas and affixed labels on the kannas, sample bottle and the glass and seized the same as per Ext.P1 mahazar in the presence of PWs 1 and 2. Thereafter he came to the Police Station and registered

Ext.P2 First Information Report against the accused. PWs 3 and 4 corroborated the evidence of PW5 on the question of arrest and seizure of contraband articles. Though they were cross examined at length, nothing was brought out to discredit their evidence on this aspect. Further, though the accused had a case that she has been falsely implicated, there was no evidence adduced on the side of the accused to prove that fact.

11. It is settled law, that merely because independent witnesses to seizure did not support the seizure is not a ground to disbelieve the prosecution case regarding seizure. Court can rely on the evidence of official witnesses if it is satisfied with its trustworthiness and base conviction on the basis of the evidence of the official witnesses alone. So in this case since nothing was brought out to discredit the evidence of PWs3 to 5 regarding this aspect and there is no enmity brought out for the police to falsely implicate the accused in the case like this, court below was perfectly justified in coming to the conclusion that the prosecution

was able to prove that the accused was arrested with MO1 kannas said to be contained arrack and MO2 glass.

12. Mere seizure of some liquid alone is not sufficient to prove the case against the accused. It must be proved by the prosecution that the same articles which were seized from the possession of the accused had reached the court in a tamper proof condition and chemical analysis report relates to that article. It is also settled law that mere delay alone is not sufficient to doubt the genuineness of the articles produced. If the delay is explained, then court can ignore the delay and convict the accused. But if the delay has not been explained properly, then the benefit must be given to the accused.

13. In this case, it is seen from Ext.P4 property list that it reached the court only on 28.9.1999 though the alleged seizure was on 25.9.1999. Neither PW5 nor PW6 had any reason for the delay in producing the articles. They did not state anything about as to who was in possession of the articles till it was produced before the court. In the

dictum laid down in the decision reported in Ravi v State of Kerala Another [2011 (3) KHC 121] it has been observed that if no report has been filed stating the reason for the delay and the delay has not been explained, then that benefit must be given to the accused. In this case, court below had come to the conclusion that though there was delay, since no prejudice has been established by the accused that is not a ground for acquittal which is not correct in view of the dictum laid down in the above decision.

14. Further in this case it is seen from the evidence that the detection, arrest, seizure and investigation etc, were done by the Assistant Sub Inspector of Police who is not an Abkari Officer empowered to arrest and effect seizure and conduct investigation under Section 34 of the Abkari Act. The Assistant Sub Inspectors of Police were not authorised as Abkari Officers to exercise the powers of Abkari Officer under the Act. The court below had come to the conclusion that since the Assistant Sub Inspectors were also vested with the power under Sections 4 and 5 of the

Abkari Act, though they are not covered by the notification they can detect and arrest and effect seizure in Abkari offences. But that was found to be not correct in the decision reported in Sabu v State of Kerala [2007 (4) KLT 169], in which it was observed that the Assistant Sub Inspector of Police is not an authorised officer empowered to detect and investigate an offence under the Abkari Act as he was not covered by the notifications issued by the Government in this regard, viz, SRO 321/1996. Further in this case there is no document produced on the side of the prosecution to prove that PW5 was in charge of the Police Station in the absence of PW6, getting the powers of the Station House Officer to detect the crime. Such an evidence is also not available in this case. Further the dictum laid down in the decision reported in Sabu v State of Kerala [2007 (4) KLT 169] was approved by the Division Bench of this court in Subash v State of Kerala [2008 (2) KLT 1047]. So merely because the investigation was verified and final report was filed by PW6 the Abkari Officer will not validate

the act of seizure and arrest made by PW5 the Assistant Sub Inspector of Police who is not an Abkari Officer and as such no conviction can be based on such arrest and seizure. If seizure is found to be done by a person who is not to empowered to effect seizure, then the seizure is bad in law, and no conviction can be based on such seizure made by an incompetent person.

15. Further in this case the investigation was also conducted by a person who is not competent to conduct investigation and as such investigation is also bad in law. This view has been reiterated in the decision reported in *Subramaniyan v State of Kerala* [2010 (2) KLT 417] in which this court has occasion to consider the question as to whether Assistant Excise Inspector can be deemed to be Abkari Officers, though they are superior officer to preventive officer who is entitled to detect, arrest and seize the contraband articles under the Act found that they are not competent to exercise powers of Abkari Officer under the Act and any act done by them is not sufficient to attract

conviction under this Act and that benefit must be given to the accused. The same view has been reiterated in the decision reported in Saseendran v State of Kerala [2012 (2) KLT 392] as well.

16. So under the circumstances, since detection, arrest, seizure, investigation were conducted by the Assistant Sub Inspector who is not an Abkari Officer which is not good law, the conviction entered by the court below against the appellant for the offence under Section 55(a) and (i) of the Abkari Act are unsustainable in law and the same is liable to be set aside. In view of the finding that conviction entered by the court below is unsustainable in law, the sentence imposed is also not proper. The same is also set aside. The appellant is entitled to get acquittal of the charge levelled against her giving her the benefit of illegality in the arrest and seizure and investigation conducted by an incompetent person.

In the result the appellant succeeds, and the appeal is allowed. The order of conviction and sentence passed by

the court below under Section 55(a) and (i) of the Abkari Act are hereby set aside and the appellant is acquitted of the charge levelled against her giving her the benefit of illegality in conducting detection, search and investigation by an incompetent officer. She is set at liberty. The bail bond executed by her will stand cancelled. The lower court is directed to refund the fine amount, if any remitted by the appellant to her on making necessary application for that purpose.

Office is directed to communicate this order to concerned court immediately.

Sd/-

K.RAMAKRISHNAN, JUDGE

SKV