

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

THURSDAY, THE 3RD DAY OF SEPTEMBER 2015/12TH BHADRA, 1937

CRL.A.No. 2050 of 2005 ()

AGAINST THE CONVICTION AND SENTENCE IN S.C.NO. 103/2001 ON THE FILE OF
ADDITIONAL SESSIONS JUDGE FOR THE TRIAL OF ABKARI CASES, NEYYATTINKARA.

APPELLANT/ACCUSED:

VIMALA, D/O.PENNAMMA,
KALLUVILA VEEDU, CHALATHOTTAM, KOTTUKAL VILLAGE,
NEYYATTINKARA.

BY ADV. SRI.G.SUDHEER KARAKONAM

RESPONDENT/COMPLAINANT:

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

R BY PUBLIC PROSECUTOR SMT. SEENA RAMAKRISHNAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
03-09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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K. RAMAKRISHNAN, J

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Crl.Appeal No.2050 of 2005

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Dated this the 3rd day of September, 2015

ORDER

Accused in S.C No. 103/2001 on the file of the Additional Sessions Court, Trial of Abkari Act cases, Neyyatinkara is the appellant herein. The appellant was charge sheeted by the Sub Inspector of Police Vizhinjam Police Station in Crime No.213/98 of Vizhinjam Police Station u/s 55(a) of the Abkari Act (ought to be u/s 8(1) of the Abkari Act).

2. The case of the prosecution in nut shell was that on 10.11.1998 at about 5 p.m, while PW1 was in the station, he received information that the accused was selling arrack from her house and immediately he along with PW2 and women Police Constable and reached the place and found the accused with MO1 cannas and a glass in her hand in front of the house. On examination it was found that it contained 7 ltrs of arrack and she had committed the offence punishable u/s 55(a) of the Abkari Act.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court No.II, Neyyattinkara, where it was taken on file as C.P No.67/2000. The learned Magistrate committed the case to the Sessions Court, Thiruvananthapuram u/s 209 of the Code of Criminal Procedure (hereinafter called 'the Code') where it was taken on file as S.C No,. 103/2001 and

thereafter it was originally made over to Assistant Sessions Court, Neyyattinkara for disposal and thereafter withdrawn and made over to Additional Sessions Court for trial of Abkari cases, Neyyattinkara for disposal.

4. When the accused appeared before the court below after hearing both sides charge u/s 55(a) 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, PWs1 to 3 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 u/s 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 has been falsely implicated in the case. Since the evidence in the case did not warrant and acquittal u/s 232 of the Code, the learned Additional Sessions Judge directed the accused to enter on defence but no defence evidence was adduced on her side. After considering the evidence on record, the court below found the appellant guilty u/s 55(a) of the Abkari Act and convicted her thereunder and sentenced her to undergo rigorous imprisonment for 2

years and also to pay a fine of Rs. 1 lakh and in default to undergo Simple Imprisonment for three months. Set off was allowed for a period of detention already undergone u/s 428 of the Code. Aggrieved by the same, the present appeal has been preferred by the appellant before the court below.

5. Heard the learned counsel for the appellant Miss. Asha representing Sri. G. Sudheer Karakonam the counsel for the appellant and Smt. Seena Ramakrishnan, learned Public Prosecutor appearing for the same.

6. The counsel for the appellant submitted that there is contradictions in the evidence of PWs 2 and 3 regarding the manner in which the seizure was effected. Further PW1 the independent witnesses did not support the prosecution. The investigation and detention in the investigation was conducted by the same officer. Further the sample was not produced in court along with the property list and there is no evidence as to when it was produced. So it cannot be said that it was produced in court in tamper proof condition. So according to the learned counsel, the court below was not justified in convicting the appellant and she is entitled to get acquittal.

7. On the other hand the learned Public Prosecutor submitted that the evidence of Pws 2 and 3 will go to show

that the prosecution has forward the seizure of the article from the possession of the accused and the articles were produced in the court on the same day which shows that there is no possibility of tampering and the court below was perfectly justified in convicting the appellant for the offence alleged.

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

9. On 10.11.1998, at about 5 p.m while PW3 was in the Station he got information that accused was engaged in sale of arrack from her house and immediately he along with PW2 and women Police Constable went to the house of the accused and when they reached there they found the accused standing in front of her house with MO1 cannnas in her hand and MO2 glass and on seeing the police party she found perplexed. So he stopped her and examined the contents of the cannas and found that it contained 7 litres of liquor. He tasted the same and convinced that it was arrack and he had further stated that he had taken 250 ml sample and sealed the same and affixed label and thereafter sealed the cannas and seized the same as per Ext.P1 Mahazar in the presence of PW1 and another. He arrested the accused with the help of

women police constable and came to the police station along with the contraband articles on the accused and registered Ext.P2 first information report as Crime No.213/98 of Vizhinjam Police Station u/s 55(a) and 8(1) of the Abkari Act. Thereafter, he conducted the investigation and sent the articles to Court along with Ext.P4 property list. He had produced the accused before the court along with Ext.P3 remand report. He sent forwarding note with request to send the sample for analysis and Ext.P5 chemical analysis report obtained which shows that the sample contained 32.24 % volume of ethyl alcohol. He completed the investigation and submitted final report.

10. Though PW1, the independent witness, admitted his signature in Ext.P1, denied having seen the seizure but he had admitted that he had signed Ext.P1 from the road in front of the house of the accused. So it is clear from this that he is now trying to help the accused and that was the reason why he is not supporting the case of the prosecution. The prosecution relies on the evidence of PWs2 and 3 to prove the seizure. PW3 is the detecting cum investigating officer. He had disposed about the manner in which the seizure was effected and arrested the accused and sample taken and

preparation of Ext.P1 Mahazar etc. His evidence was corroborated by PW2, the Head Constable who accompanied him. Though they were cross examined at length nothing was brought out to discredit their evidence regarding the seizure of MO1 kannas and a glass from the possession of the accused.

11. But that alone is not sufficient to convict the accused for the offence u/s 55(a) and 8(1) of the Abkari Act. Unless it is proved by the prosecution that the article produced before the court and Ext.P5 chemical analysis report relates to the representative sample taken from the contraband article seized from the possession of the accused, it cannot be said that prosecution has proved the case beyond reasonable doubt. In this case though PWs2 and 3 have stated that they were affixed label on MO1 kannas also such thing was not mentioned in Ext.P1 Mahazar. In Ext.P1 Mahazar it was only mentioned that the label was affixed on the sample bottle alone. It is true that MO1 kannas and MO2 glass were produced before the court on the same day of detection as seen from Ext.P4 property list. There is nothing mentioned about the sample in Ext.P4. According to PW3, it was produced along with forwarding note but unfortunately,

the forwarding note was not marked so as to come to the ascertain as to when exactly the forwarding note was produced along with the sample bottle. There is no explanation forthcoming from the side of the prosecution as to why the sample was not produced along with the property list. According to PW3, normally they use to produce the same along with the forwarding note. But that procedure cannot be said to be proper as the contraband articles including the sample has to be produced along with the property list before the court as far as possible forthwith or without delay after seizure. In this case there is no evidence forthcoming as to when exactly the sample was produced before the court. But the court below had come to conclusion that the sample was produced before the court along with Ext.P4 on the same day and there is no possibility of tamper. But Ext.P4 shows otherwise and it was admitted by PW3 also that the production of sample was not mentioned in Ext.,P4 and it was produced separately along with forwarding note which was not marked in evidence. So under the circumstances, it cannot be said that prosecution has proved beyond reasonable doubt that the sample was produced before the court in tamper proof condition and Ext.P5 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 so as to come to the conclusion that the accused was found to be in possession of arrack. So the finding of the court below that the prosecution has proved this fact beyond reasonable doubt and consequential conviction entered by the court below against the appellant u/s 55(a) of the Abkari Act wrongly for Sec. 8(1) of the Abkari Act 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 her and giving her the benefit of doubt. In view of the finding that the appellant is entitled to get acquittal, and the sentence imposed by the court below 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 u/s 55(a) wrongly for 8(1) of the Abkari Act are hereby set aside and she is acquitted of the charge levelled against her giving her the benefit of doubt. The bail bond executed by her will stand cancelled. The lower court is directed to refund the fine amount, if any, deposited by appellant to her on making necessary application for that

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

sd/-

sab

K. RAMAKRISHNAN, JUDGE