IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

THURSDAY, THE 6TH DAY OF AUGUST 2015/15TH SRAVANA, 1937

CRL.A.No. 2115 of 2005 ( )

AGAINST THE JUDGMENT IN SC 486/2004 of ADDITIONAL DISTRICT & SESSIONS COURT (ADHOC), FAST TRACK COURT - 1, PATHANAMTHITTA DATED 05-11-2005

APPELLANT(S)/ACCUSED.:

RADHAKRISHNAN
ASARIVILA THECKETTIL VEEDU, THENGAMAM KARA
ADOOR TALUK, PATHANAMTHTITA DISTRICT.

BY ADVS.SRI.K.S.SIVA KUMAR
SRI.C.B.SREEKUMAR

RESPONDENT(S)/COMPLAINANT.:

STATE OF KERALA
EXCISE INSPECTOR, ADOOR RANGE, REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

R1 BY PUBLIC PROSECUTOR,SMT. SAREENA GEORGE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 06-08-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

acd

P.D. RAJAN, J.

Crl. Appeal No.2115 of 2005

Dated this the 6th day of August, 2015

JUDGMENT

The appellant, who is the accused in S.C.486/2004 of the Additional District & Sessions Court, Pathanamthitta, challenges the conviction and sentence passed u/s.8(1) and (2) of the Abkari Act. He was convicted and sentenced to undergo rigorous imprisonment for two years and to pay a fine of ₹1 lakh, in default to undergo simple imprisonment for two years.

2. The facts necessary for the indictment were that on 23.8.2000 at 12.15 noon, PW1 and his Excise party were conducting patrol duty along the Thengamam-Pazhakulam public road, when they reached in front of the shop of one

Narayanavilasam Gopalan, the appellant was found carrying two litres of arrack in a cannas. PW1 seized the arrack, after preparing a mahazar, reaching at the Excise Office, he registered a crime and occurrence report. After completing investigation, laid charge before Judicial First Class Magistrate Court, Adoor, from there the case was committed to Sessions Court for trial.

3. To prove the seizure of arrack, the prosecution examined occurrence witness and also admitted documentary evidence. The evidence consists of oral testimony of PW1 to PW5 and documentary evidence of Ext.P1 to P9. The material object MO1 was marked in this case. The incriminating circumstances brought out in evidence were denied by the appellant while questioning u/s.313 Cr.P.C. He was also heard u/s.232 Cr.P.C. The appellant examined DW1 in support of his defence. After

hearing both sides, the trial Court convicted the appellant.

4. The learned counsel for the appellant contended that the seal in Ext.P8 forwarding note was not clear, when it was examined in the trial Court. There was no independent corroboration to the alleged seizure. There is no evidence to prove that MO1 was in possession of the appellant. The learned counsel relied the decision in **Rajamma** v. **State of Kerala** [2014(1) KLT 506]

5. Now the question is whether MO1 was seized from the possession of the appellant. According to the prosecution, the seizure was made by PW1 on 23.8.2000 at 12.15 noon while he was conducting patrol duty with his Excise party. PW1 is the Preventive Officer, Excise Circle Office, Adoor. His evidence shows that when they reached near the shop of one Narayanavilasm Gopalan on the Thengamam-Pazhakulam public road, they found the

appellant walking through the western side of the road margin at a distance of 10 meters away from the shop. PW1 and his party were proceeding from south to north. The appellant was found carrying MO1 plastic cannas and proceeding from the opposite side. He became frightened and tried to go back. PW1 intercepted him and examined the cannas . He detected two litres of arrack in MO1. Two independent witnesses present there saw the seizure. After inspection of the liquor in the cannas, he affirmed it as arrack, for that he prepared Ext.P1 mahazar, arrested the appellant and MO1 was taken into custody. From the cannas, a sample of 300Ml was collected in a sample bottle of 375ml capacity. The sample bottle and the MO1 with balance arrack were sealed and labelled at the place of occurrence. The appellant, the independent witnesses present there and PW1 signed in the sample and the balance arrack. PW1 identified signature in Ext.P2. The brother of the appellant signed in Ext.P2. He entrusted the article in the Excise Circle Office, from there it was forwarded to Excise Range Office, for further action. PW1 identified the seal and signature in MO1 also. While cross examination, he admitted that an abandoned can was inspected, which was mentioned in his statement given to PW5. He stated that it is only a mistake at the time of writing by PW5.

6. PW3, who was present with PW1 supported the seizure. He deposed that PW1 seized MO1 from the possession of the appellant. He identified MO1 and the signature in Ext.P1. Analysing the evidence of PW1 and PW3, it is clear that PW1 seized MO1 from the appellant.

7. The independent witness, PW2 did not support the prosecution case. He deposed that he did not see the

seizure of MO1 from the possession of the appellant as stated by PW1. He denied the signature in Ext.P1. He never saw the appellant and PW5 never recorded his statement. This witness declared hostile by the prosecution. In this context, the evidence of PW5 is relevant. He admitted that he conducted investigation in this case. While he was working as Range Excise Inspector, Mallappally, as per the direction of Assistant Excise Commissioner, he conducted investigation in this case. He questioned PW2. During cross examination, he admitted that he recorded the statement of PW1. At that time, PW1 gave a statement that 'ഉപേക്ഷിച്ചുപോയ കന്നാസ് പരിശോധിച്ചതിൽ'. but, he was unable to say about the place where Mo1 was abandoned. There are several shops and people at the place of occurrence. This will create doubt in the credibility of the alleged seizure. PW4 received

MO1 and the sample bottle at Adoor Excise Range Office. Ext.P4 is the notice of arrest. On the basis of that, he registered Ext.P5 Crime No.102/2000 and occurrence report. The appellant was produced before Court as per Ext.P6 remand application. He prepared Ext.P7 thondi list. He gave Ext.P8 forwarding note for sending the sample for chemical examination. Ext.P9 is the Chemical examiner's result, which shows that 32.18% of ethyl alcohol detected in the sample arrack. He also identified MO1. The label was destroyed due to passage of time. The seal was also fade. A close scrutiny of the evidence shows that the seizure was made by PW1 from a public place in the presence of independent witness. But, the witness present there did not support the case and another independent witness is no more.

8. The learned Public Prosecutor submitted that

there is no reason to disbelieve these two witnesses and no previous enemity alleged against these witnesses. It is true that there is no enmity alleged against these two witnesses. The mere fact that the official witnesses, who supported the prosecution case, are Excise Officials, is not a ground to discard their evidence, in the absence of any hostility towards the appellant. But, in the light of the evidence of PW5, there is some discrepancy in the method of seizure. PW5, who conducted investigation, deposed that while questioning PW1, he admitted that MO1 was abandoned by the appellant, from there it was seized by PW1, after preparing Ext.P1 seizure mahazar. Analysing the evidence of PW5 and PW1, it is clear that the actual statement given by PW1 was recorded by PW5 and therefore, it is not a mistake. When there is no independent corroboration to the alleged seizure, I cannot throw the evidence of PW5 in a light manner. When there is no independent corroboration to the prosecution case, the Court has to scrutinise the evidence of the excise officials more rigorously so as to ensure the bona fides of the alleged seizure. The evidence of PW1 and PW3 alone is not sufficient to sustain a conviction. Independent evidence is necessary to show that the excise officials seized the articles, according to the facts and circumstances mentioned in the seizure mahazar. In Ext.P1 seizure mahazar, PW1 stated one story and he deposed another story to the Excise Inspector. From the above, it is clear that there were two inconsistent versions. When two inconsistent versions are there, the version in support of the accused is to be relied and the appellant is entitled to get the benefit of doubt. The conviction against the appellant is to be set aside.

In the result, the conviction and sentence passed by the trial court in S.C.No.486/2004 are set aside and the appellant is set at liberty.

P.D. RAJAN, JUDGE.

acd