

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

THURSDAY, THE 18TH DAY OF JUNE 2015/28TH JYAISHTA, 1937

CRL.A.No. 2117 of 2005 ()

**AGAINST THE JUDGMENT IN SC 177/2003 of ADDL. SESSIONS COURT (ADHOC-III),
KASARAGODE DATED 28-10-2005**

APPELLANT(S)/ACCUSED:

**EROL KUNHIKORAN MANIYANI,
S/O.MALINKAN, RESIDING AT THANNOT,
CHITHARI VILLAGE,
HOSDURG TALUK.**

**BY ADVS.SRI.RAHUL SASI
SMT.NEETHU PREM**

RESPONDENT(S)/COMPLAINANT:

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

BY ADV. PUBLIC PROSECUTOR SMT.SEENA RAMAKRISHNAN

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 18-06-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

STK

P.D. RAJAN, J.

Crl. A. No.2117 of 2005

Dated this the 18th day of June, 2015

JUDGMENT

This appeal is preferred against the judgment in SC 177/03 of the Additional Sessions Judge (Adhoc) III, Kasaragod in which appellant was convicted under Section 55(a) of the Abkari Act and sentenced to undergo simple imprisonment for one year and to pay a fine amount of rupees One lakh, in default of payment of fine, simple imprisonment for six months.

2. The facts necessary for the indictment were that on 5.9.2000 at 6 pm, the Preventive Officer, Excise Enforcement and Anti-Narcotic Special Cell, Kasaragod was conducting patrol duty and they reached in front of the house of one Muhammed Kunhi on the Chalingal to Thannottu Colony in Pulloor Village, the appellant was found carrying 130 packets of arrack. The excise party intercepted the appellant and inspected the plastic sack and took three packets as sample. The appellant was arrested from the place of occurrence and contraband

articles were seized. Subsequently, he was produced before Excise Range Office, Hosdurg and registered crime and occurrence report No.38/2000 and Excise Inspector, Hosdurg laid charge against the appellant before Judicial First Class Magistrate Court, Kasaragod, from there the case was committed to Sessions Court, Kasaragod for trial.

3. To prove the offence, prosecution examined PW1 to PW7 and marked Ext.P.1 to P7 and MO1 to MO3 series. The incriminating circumstances brought out in evidence were denied by him while questioning under Section 313 Cr.P.C. He was also heard under Section 232 Cr.P.C. and called the appellant to enter on his defence. He did not adduce any evidence in support of his defence. The trial court after sifting and weighing the evidence on record, convicted the appellant under Section 55(a) of the Abkari Act.

4. The learned counsel appearing for the appellant contended that a false case was foisted against him by the Excise Officials. He was actually arrested on the next

day, i.e. on 6.9.2000 from his house and no arrest as alleged by the PW1. There is inordinate delay in producing the appellant before court. There was also no proper sampling.

5. The learned Public Prosecutor contended that no infirmity is attached in the case with regard to the arrest and seizure of the appellant. No delay had occurred and all formalities were complied by the detecting officer.

6. In this context, the main point for consideration is whether the prosecution version about the seizure is believable. According to their evidence MO1 to MO3 were seized by the Excise Officials as per Ext.P2 Mahazar. The evidence of PW1 shows that he was conducting patrol duty within his jurisdiction on 5.9. 2000 at 6 pm, when he reached at the place of occurrence, the appellant was found carrying MO1 plastic bag. Upon suspicion, they intercepted him and opened the bag, from that they detected 130 packets of arrack. They seized the arrack after preparing Ext.P2 mahazar and took three packets as sample. The remaining packets were sealed on the place

of occurrence after affixing label. The appellant, the sample packets and balance arrack were produced before Excise Range Office. PW2 and PW3 who were the Excise Officials also narrated the story as stated by PW1. These witnesses were cross-examined by the defence counsel. Nothing has been brought out to discredit their evidence. Analyzing their oral evidence, it is found that the initial responsibility in discharging the onus of proof is already established against the appellant.

7. The independent witness present there did not support the prosecution case. They turned hostile. PW4 and 5 attested Ext.P2 mahazar. They admitted their signature in the mahazar. The attesting witnesses present there did not support the prosecution case is not a ground to discard the arrest and seizure of the contraband article by PW1. This position has been explained in **Nathusing V. State of MP AIR 1973 SC 2783**. The mere fact that the prosecution witnesses are Police Officers is not enough to discard their evidence, in the absence of their hostility to the accused. Therefore, if the

independent witness turned hostile, the court cannot throw out the prosecution case on that ground alone. The court has to then scrutinize the evidence far more rigorously. The rigorous examination of the oral testimony of PW4 and PW5 show that the materials seized by PW1 are strong enough to prove the alleged seizure. The independent witnesses at the place of occurrence at the time of seizure is insisted in order to ensure fairness in the proceedings initiated by the Excise Officials. Even though, PW4 and PW5 have turned hostile, that itself is not a ground to discard the alleged seizure since they admit their signature in Ext.P2, when it was prepared by PW1.

8. The crime and occurrence report was registered by PW3. Ext.P3 is the crime report. The properties were forwarded to the court by preparing Ext.P4 forwarding note and Ext.P5 property list. The accused was also produced before court with remand application. The sample arrack was forwarded to the chemical examiner's lab through court. Ext.P6 chemical analysis report shows

that sealed packets containing 300ml of clear and colourless liquid alleged to be arrack was involved in Crime No.38/00 of Hosdurg Excise Range received in the office of chemical analysis. The seal in bottle was intact and found tallied with the sample seal provided. The received articles have been examined by the Assistant Chemical Examiner under her personal supervision and report was sent. It shows that ethyl alcohol was detected in the sample. The sample liquid contained 30.01% by volume of ethyl alcohol. The appellants have no dispute with regard to the content in Ext.P6. If that be the position, I am of the view that the seized article contained ethyl alcohol and prosecution substantially established that point.

9. The Village Officer, PW6 prepared Ext.P7 site plan and Excise Inspector laid the charge, I find no illegality even though the appellant contended that there is inordinate delay. But that delay was properly explained by the Excise Officials and nothing has been brought out to discard the evidence of the Excise Officials. The trial court

considered the above points and convicted the appellant under Section 55(a) of the Abkari Act.

10. The principle of just punishment is a challenge in respect of a criminal offence, therefore a punishment should not be disproportionately excessive. The concept of proportionately allows a significant discretion to the Judge but the same has to be guided by certain principles. The Apex Court in **Siriya V. State of M.P. 2008 (8) SCC 72** held that Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of 'order' should meet the challenges confronting the society. Therefore just punishment is the corrective crime of the society and while imposing punishment, the principle of proportionality between the crime and punishment cannot totally be brushed aside.

11. The Apex Court in **Sasikumar V. State of Kerala 2012 (4) KLT 867(SC)** held that:

“Before parting with the record of the case,

we would like to point out that S.8(2) of the Abkari Act does not fix any upper limit for the fine but lays down that the fine shall not be less than Rs.1,00,000/-. Since the minimum amount of fine prescribed by the law is kept so high, the courts naturally give the default sentence of imprisonment for a substantially longer period. As noted above, the trial court has given the default sentence of one year which was reduced by the High Court to six months. We may note that in cases where poor people like the appellants who may only be the carrier of the arrack or who may be trying to eke out a living from the illegal trade are caught committing the offence, they are hardly in position to pay the fine of Rs.1,00,000/- and for them the default sentence becomes an additional period of incarceration. In a way, fixing the minimum fine at such a high amount, regardless of the countless possible variables in the commission of the offence under S.8(1), leads to discrimination in favour of those convicts who have sufficient means to pay the fine and, thus, avoid any default imprisonment and the small fries for whom the default sentence would invariably mean an additional sentence of imprisonment. To our mind, it is desirable to leave the Court free in exercise of judicial discretion in the matter of imposition of fine."

12. The quantity seized from the possession of the appellant was 10 litres. The appellant is having wife and

three children and he has to maintain the family. Considering the above, I am of the opinion that the conviction of the appellant under Section 55(a) of the Abkari Act is only be confirmed and I modify the sentence imposed on him as follows:

- a)Appellant is sentenced to imprisonment for three months and to pay a fine of rupees one lakh and in default of payment of fine simple imprisonment of 15 days.
- b)The period of detention if any, undergone by him during the investigation, enquiry or trial shall be set-off against the term of imprisonment.

This appeal is partly allowed.

STK

Sd/-
P.D. RAJAN,
JUDGE

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P.A. TO JUDGE