

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 21ST DAY OF DECEMBER 2015/30TH AGRAHAYANA, 1937

CRL.A.No. 2125 of 2005 ()

AGAINST THE JUDGMENT IN SC 169/2004 of ADDL.SESIONS COURT
FAST TRACK-II, PALAKKAD, DATED 23-11-2005.

APPELLANT/ACCUSED:

RAMAKRISHNAN, S/O. PANKU,
CHERUTHODY HOUSE, KUZHIKOTTIRI DESOM,
MUTHUTHALA VILLAGE, OTTAPPALAM TALUK.

BY ADV. SRI.M.C.JOHN

RESPONDENT/COMPLAINANT:

STATE OF KERALA REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM,
REPRESENTING EXCISE RANGE INSPECTOR,
PATTAMBI EXCISE RANGE (CRIME NO.20/2000),
PATTAMBI.

PUBLIC PROSECUTOR SRI. JIBU P. THOMAS.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 21-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SS

K. RAMAKRISHNAN, J.

Crl. Appeal No.2125 of 2005

Dated this the 21st day of December, 2015

JUDGMENT

Accused in S.C.No.169/2004 on the file of the Additional Sessions Court (Fast Track-II), Palakkad, is the appellant herein. The appellant was charge-sheeted by the Excise Inspector, Pattambi Excise Range in Crime No.20/2000 of that Excise Range under Section 55(a) and (g) read with Section 8(2) of the Abkari Act (hereinafter called the Act).

2. The case of the prosecution in nut shell was that, on 20.11.2000 at about 5.30 p.m., the accused was found to be in possession of 150 liters of wash, fit for distillation of arrack in two 100 liter barrels and about 15 liters of illicit arrack kept in two 10 liter plastic cans in his outer compound at Kuzhikkottiri Desom in Muthuthala Village in violation of the provisions of Abkari Act and

thereby he had committed the above said offence.

3. After investigation final report was filed before the Judicial First Class Magistrate Court, Pattambi, where it was taken on file as C.P.No.4/2004. After completing the formalities, learned magistrate committed the case to Sessions Court, palakkad, under Section 209 of the Code of Criminal Procedure (hereinafter called the Code). After committal, the Sessions Judge took cognizance of the case as S.C.No.169/2004 and the same was originally made over to Assistant Sessions Court, Ottappalam, for disposal. Thereafter the case was withdrawn by the Sessions Judge and made over to Additional Sessions Court (Fast Track-II), Palakkad, for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under Section 55(a) and (g) read with Section 8(2) of Abkari Act was framed and the same was read over and explained to him and he pleaded not guilty. In order to prove the case of the

prosecution, PWs 1 to 5 were examined and Exts.P1 to P7 and MOs 1 and 2 series were marked on their side. After closure of the prosecution evidence, the accused was questioned under Section 313 of the Code of Criminal Procedure and he denied all the incriminating circumstances brought against him in the prosecution evidence. He had further stated that, no article was seized from his possession and the property did not belong to him and he has been 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 his defence. But no defence evidence was adduced on his side. After considering the evidence on record, the court below found the appellant guilty under Section 55(a) and (g) read with Section 8(2) of the Abkari Act and convicted him thereunder and sentenced him to undergo rigorous imprisonment for two years and also to pay a fine of ₹1,00,000/-, in default to undergo simple imprisonment

for six months under Section 55(a) read with Section 8(2) of the Abkari Act and further sentenced to undergo rigorous imprisonment for one year and also to pay a fine of ₹1,00,000/-, in default to undergo simple imprisonment for six months more under Section 55(g) read with Section 8(2) of Abkari Act and directed run the sentence concurrently. Set off was allowed for the period of detention already undergone by him. Aggrieved by the same, the above appeal has been preferred by the appellant/ accused before the court below.

5. Heard Sri.M.C.John, counsel appearing for the appellant and Sri.Jibu P.Thomas, Public Prosecutor appearing for the State.

6. The counsel for the appellant submitted that PWs 3 and 4, independent witnesses to the seizure had admitted their signature did not support seizure or arrest of the accused. Further even according to the prosecution, the accused was working in the property and he did not run

away from the place on seeing the excise officials. PW2 did not state that it was on the basis of the statement given by the accused and as pointed out by him that the contraband article were seized from the concealed place as claimed by PW1. There is no evidence adduced on the side of the prosecution to prove that he is the owner of the property or he had any connection with the contraband article, which has been concealed in that property and the absence of such link, the court below was not justified in convicting the appellant for the offence alleged. Learned counsel relied on the decision reported in **Mathai v. State of Kerala (2015 (3) KLT (SN) 59 case No.80)**.

7. On the other hand, learned Public Prosecutor submitted that, the accused was arrested from the spot from where the contraband articles were seized and he was produced before the court and there was no delay in producing the article before court as well. So he had not made any complaint regarding false implication. So 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 20.11.2000, while PW1 the Preventive officer, attached to Pattambi Excise Range was doing patrol duty along with PW2, the excise guard and others and at about 4.00 p.m., they got information from the Kuzhikkottirri Desom that the accused was keeping illicit arrack in his landed property. Accordingly he went to the place in the jeep and they reached Muthassiyarkavu lying on the southern side of the shop of Souparnikayil, Sankaran and thereafter they reached the place called Parakulam, the property where they found the accused were doing some agricultural operation. According to PW1, when he questioned the accused, he disclosed the place where he had concealed the articles. He pointed out the place where the articles were concealed and they went to the house on

the southern portion of the property. He found two cannases having 10 liters capacity containing total quantity of 15 liters of arrack, that was buried in the ground and covered with green leaves. So he had removed the earth in the presence of PWs 3 and 4, independent witnesses who were found in the neighbouring property. He took sample of 500 ml each in 75 ml., bottles from the two cannases containing wash and put mark 'A' and 'B' and he took two samples of 300 ml., each in 375 ml., bottles from the arrack and he had put mark 'A' and 'B' on the cannases as well as on the bottles. He seized the cannases and labeled the same using his personal seal with letters 'PG'. He had also seized two cannases containing arrack, took sample put mark 'C' and 'D' on the sample bottles and cannases, sealed and labeled the same in the same fashion. Thereafter he arrested the accused and prepared Ext.P2 arrest memo and gave intimation to his wife. He seized the articles as per Ext.P1 mahazar in the presence of PWs 3 and 4. He came

to excise office along with accused and the contraband articles seized. Since he was in charge of the excise inspector on that day, he registered Ext.P3 crime and occurrence report as Crime No.20/2000 of Pattambi Excise Range against the accused under Section 55(a) and (g) read with Section 8(2) of the Abkari Act. He produced the accused before the court on the same day along with remand report. He prepared Ext.P4 property list and produced the articles before court on the same day. He sent Ext.P5 forwarding note with a request to send the sample for analysis and the same were sent from court and Ext.P7 chemical analysis report obtained, in which it was mentioned that the samples contained 12.78%, 12.62%, 41.21% and 41.27% by volume of ethyl alcohol and the sample No. 1 and 2 had the characteristics of wash.

9. Investigation in this case was conducted by PW5, the excise Inspector. He questioned the witnesses and recorded their statements. He prepared Ext.P6 scene

mahazar along with sketch plan of the place of occurrence. He collected Ext.P7 chemical analysis report and completed the investigation and submitted final report.

10. PWs 3 and 4 are the independent witnesses to the seizure. Though they stated that they knew the accused, they denied having seen the seizure or arrest of the accused. But they have admitted their signatures in Ext.P1 mahazar. They have further stated that they did not know who is the owner of the property, whether the accused had got the property near that place. So their evidence is not helpful to prove the arrest or seizure of the contraband article as claimed by the prosecution.

11. Then the evidence available is that of PWs 1 and 2 to prove this fact. According to PW1, while he was doing patrol duty at about 4.00 p.m., on that day when they reached the place called Kuzhikkottiri Desom, got information that the accused was keeping illicit arrack in his property. Immediately he went to that place after

reaching Muthassiyarkavu, through the side of one Souparnikayil Sankaran, he reached the place called Parakulam, the property situated near that place. At that time the accused was doing some agricultural work there. According to him, when he interacted with him, he disclosed that he had concealed the wash and arrack in the southern portion of the compound. According to PW1 as pointed out by the accused, he had unearthed the contraband articles buried in the ground and then took sample and arrested the accused and seized the same. But PW2 the excise guard accompanied him did not say these aspects in detail. According to him, he had signed Ext.P1 mahazar which was prepared for the purpose of seizing some contraband article from the property of one Ramakrishnan, who is the accused in this case. Both PWs 1 and 2 have stated that they did not verify any document to show that property belongs to the accused. So the evidence of PW2 is not helpful to show that the seizure was effected

on the basis of the information given or as pointed out by the accused to PW1 as claimed by him. So under the circumstances, it cannot be said that PW2 had corroborated the evidence of PW1 on all aspects regarding the seizure. In such circumstances, merely because the accused was found in a property alone is not sufficient to come to the conclusion that he was the person who buried the the articles in the property. It cannot be treated as a recovery effected on the basis of the statement given by the accused so as to bring it under Section 27 of the Evidence Act as well.

12. In the absence of any convincing evidence or corroborative evidence given by the excise guard, it cannot be said that the prosecution has proved the case beyond reasonable doubt, that the seizure was effected as claimed by PW1 on the basis of the information given by the accused or pointed out by the accused. So at the most it can be presumed from the evidence that the accused was arrested

from the property where he was found working and from that property some contraband articles were seized as per Ext.P1 mahazar. That alone is not sufficient to convict the accused for the offence of possession of arrack or wash under Section 55(a) and (g) read with Section 8(2) of the Abkari Act. It must be proved by the prosecution that he was in conscious possession of the same. Neither PW1 nor PW2 has a case that the accused was arrested at the time when he was handling the contraband articles so as to infer that the articles were seized from his physical possession. No document or evidence adduced on the side of the prosecution that the accused was the owner or person in possession of the property as well. So in the absence of such evidence, unless it is proved by the prosecution the connection of the accused with the property it cannot be presumed that he was in conscious possession of any contraband article which was buried in the compound which was unearthed by the detecting officer as part of his

detection. These aspects were not properly considered by the court below before coming to the conclusion that the prosecution has proved the case beyond reasonable doubt that the accused was found to be in possession of the contraband articles and consequential conviction entered by the court below for these offences is unsustainable in law and the same is liable to be set aside. So the appellant is entitled to get acquittal of the charge levelled against him giving him the benefit of doubt. In view of the finding that the appellant is entitled to get acquittal, the sentence imposed is 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 55(a) and (g) read with Section 8(2) of the Abkari Act was hereby set aside and he is acquitted of the charge levelled against him giving him the benefit of doubt. He is set at liberty. The bail bond executed by him will stand

canceled. The court below is directed to refund the fine amount if any remitted by the appellant to him, on making necessary application for that purpose before that court.

Office is directed to communicate this judgment to the court below at the earliest.

Sd/-
K. Ramakrishnan, Judge

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P.A. to Judge

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