

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 12TH DAY OF OCTOBER 2015/20TH ASWINA, 1937

CRL.A.No. 2143 of 2005 ()

AGAINST THE JUDGMENT IN SC 394/2003 of ADDL.SESIONS COURT (ADHOC)-II,
MANJERI DATED 08-12-2005
APPELLANT/FIRST ACCUSED::

SHAJI LAL, S/O. THOMAS @ NANU,
LAL BHAVAN, KADAVOOR DESOM,
KANDAMANGALAM VILLAGE
MAVELIKARA TALUK, ALAPPUZHA DISTRICT.

BY ADVS.DR.K.P.SATHEESAN
SRI.K.K.GOPINATHAN NAIR
SMT.C.V.RAJALAKSHMI
SRI.M.R.JAYAPRASAD
SRI.K.K.RAJEEV

RESPONDENTS/STATE & COMPLAINANT::

1. STATE OF KERALA, REPRESENTED BY
THE DIRECTOR OF PUBLIC PROSECUTIONS
HIGH COURT OF KERALA, ERNAKULAM.

2. THE EXCISE INSPECTOR, NILAMBUR
EXCISE RANGE, NILAMBUR, MALAPPURAM DISTRICT.

R1 BY PUBLIC PROSECUTORSRI.JIBU P. THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 12-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. RAMAKRISHNAN, J.

.....
Crl.A.No.2143 of 2005
.....

Dated this the 12th day of October, 2015.

JUDGMENT

The accused in S.C.No.394/2003 on the file of the Additional Sessions Court (Adhoc)-II, Manjeri, is the appellant herein.

2. The appellant along with the second accused, driver of the vehicle, was charge sheeted by the Excise Inspector, Nilambur excise range in Crime No.29/1998 of that range under section 55(a) of the Abkari Act.

3. The case of the prosecution in nutshell was that on 2.8.1998 at about 10.30 p.m the first accused being the owner of the mini cargo lorry TN-33 C 4921 and second accused being the driver of the same lorry were found transiting 924 bottles of Old Port XXX Delex Rum each having 750 ml in 77 cardboard cases and 624 bottles of Old Port XXX Delex Rum each having capacity of 375ml in 26 cardboard cases in violation of the provisions of the Abkari Act and thereby they have committed the offences punishable under section 55(a) of the Abkari Act.

4. After investigation, final report was filed before the Judicial First Class Magistrate Court, Nilambur where it was taken on file as C.P.No.43/2003. After complying with the formalities, learned Magistrate committed the case to Sessions Court, Manjeri and learned Sessions Judge took cognizance of the case as S.C.No.394/2003 after committal. Thereafter it was originally made over to the Assistant Sessions Court, Manjeri for disposal. When the case was pending before the Assistant Sessions Court, Manjeri, the first accused appeared and after hearing both sides, charge under section 55(a) of the Abkari Act was framed against him and the same was read over and explained to him and he pleaded not guilty. Thereafter, the case was withdrawn by the Sessions Judge and made over to the Additional Sessions Court(Adhoc)-II, Manjeri for disposal.

5. In order to prove the case of the prosecution, Pws 1 to 5 were examined and Exts.P1 to P5 and MOs 1 and 2 were marked on their side. After closure of the prosecution evidence, accused was questioned under section 313 of the Code and he denied all the incriminating circumstances brought against him in the prosecution evidence. He had further stated that he had

not committed any offence and he is innocent of the same. Since evidence in this case did not warrant an acquittal under section 232 of the Code, learned Sessions Judge directed the appellant to enter on his defence. But no defence evidence was adduced on his side but only marked Ext.D1 through PW1, the investigating officer. After considering the evidence on record, the court below found the appellant guilty under section 55(a) of the Abkari Act and convicted him thereunder and sentenced him to undergo rigorous imprisonment for five years and also to pay a fine of Rs. Two lakhs, in default to undergo rigorous imprisonment for two years more. Set off was allowed for the period of detention already undergone. Aggrieved by the same, the present appeal has been preferred by the appellant/first accused before the court below.

6. Heard Dr. K.P.Satheesan, counsel appearing for the appellant and Sri. Jibu P. Thoams, Public Prosecutor appearing for the State.

7. Learned counsel for the appellant submitted that there is no evidence to show that the first accused was in conscious possession of the articles. He was only travelling in the vehicle

and the vehicle was stopped at the check post and he had accompanied the driver to the check post. When the vehicle was directed to be examined, the driver absconded and since he was available there, he along with the articles were taken into custody and produced before court. Further, no investigation was conducted as to who was the owner of the vehicle, what is the connection between the first accused and the vehicle, from where the articles were transported etc as well. There was delay of 4 days in producing the article which has not been explained also. So under the circumstances, according to the learned counsel, the prosecution has failed to prove the case against the accused beyond reasonable doubt and he is entitled to get acquittal.

8. On the other hand, learned Public Prosecutor submitted that there is no evidence adduced on the side of the accused to disprove the fact that he was not the owner of the vehicle and he was not travelling in the vehicle and he boarded the vehicle in the middle as submitted by the counsel for the appellant. Further, the occurrence report itself contains the nature of articles seized and that reached the court on 2.8.1998 and

since large quantity of articles are there, delay in production before court cannot be said to be without any reason. So according to the Public Prosecutor, the court below was perfectly justified in convicting the appellant for the offence alleged.

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

On 2.8.1998 while PW1, the Preventive Officer was on special duty at Anamari check post in Vazhikadavu amsom, at about 10.30 p.m they saw the lorry with No. TN 33C-4921 driven by the second accused with the first accused in the cabin came through check post and they stopped the vehicle for the purpose of verification. The driver came to the check post with documents and they confirmed from the document that the lorry is transiting tea dust in the cardboard box. It was covered with tarpaulin. They wanted to examine the vehicle but the driver of the vehicle did not allow the examination. Since they insisted for examination, the driver left the place. On examination, they found in some of the boxes on the upper layer contains tea dust box and when they

removed those boxes, they found huge quantity of Indian Made foreign liquor kept in 90 cardboard boxes of which 924 bottles of Old Port XXX Delex Rum each having 750 ml and 624 bottles of Old Port XXX Delex Rum each containing 375 ml and when they questioned the first accused, he had said to have told that the driver told that they were only transporting tea dust and he was not aware of anything. Thereafter he conducted search of the vehicle and satisfied that they were Indian Made foreign liquor manufactured at Karnataka by Amrut Finest Liquors. Thereafter as informed by him, Sri. Vijaya Kumar, attached to Nilambur excise range office came there. PW1 prepared mahazer and seized the articles and lorry and entrusted the same to Sri. Vijayakumar, who thereafter registered Ext.P3 occurrence report. PW1 prepared Ext.P1 mahazer and also Ext.P2 arrest memo of the first accused. Thereafter the said Vijayakumar prepared forwarding note. Investigation in this case was conducted by Pws 4 and 5. PW5 completed the investigation and submitted final report. On the basis of the request given, two samples taken from each category were sent for analysis and

Ext.P5 report obtained. PW5 collected the report, completed investigation and submitted final report.

10. PW2 is an independent witness to the alleged seizure. Though he admitted the signature in Exts.P1 and P2, he did not support the case of the prosecution regarding seizure or arrest of the accused. He had also stated that he did not see any person in the vehicle and he did not see the actual seizure of the contraband article from the vehicle. Even going by the evidence of Pws 1 and 3, it will be seen that on 2.8.1998 while they were on duty in the check post, they saw the said vehicle coming and they stopped the vehicle and the driver came and handed over the documents and found that as per the documents, tea dust of Lipton India Export Ltd was being transported in the vehicle. Further it will be seen from the evidence of Pws 1 and 3 that when they wanted to examine the vehicle, the driver of the vehicle wanted the vehicle to be released immediately and he showed reluctance to examine the vehicle. When they were about to examine the vehicle, driver left the place. On examination they found huge quantity of Indian made foreign liquor found beneath the cardboard box

containing tea dust. So they seized articles and arrested the first accused. Even it will be seen from the seizure mahazer when PW1 questioned the first accused he had stated that :

ലോറിയുടെ ഉടമസ്ഥനാണെന്നും ലോറിയിലുള്ള ലോഡിനെ കുറിച്ച് ഡ്രൈവർ പറഞ്ഞത് തേയില കാർട്ടൻ ആണെന്നും മറ്റൊന്നുമില്ലെന്നും പറയുന്നു.

So he had no knowledge about the articles transported in the vehicle and he had only knowledge about what was said by the driver of the vehicle as what was transported was tea dust in the vehicle. Further though it is stated by him that he was the owner of the vehicle, no attempt was made to find out connection between the vehicle and the first accused and from where the articles were transported and who was the owner of the article etc. It is true that it is not necessary to prove as to who was the owner of the article or who was the owner of the vehicle, if there is evidence to show that articles belonged to first accused and he was transporting the same for his purpose. Even from the evidence, it is clear that they have no doubt about the first accused when they stopped the vehicle and from his conduct also there is nothing to infer that any contraband articles were transported in the vehicle with his connivance or he had any connection with the contraband

article or at his instance it was transported. He did not attempt to go away from that place when examination of the vehicle was done by the excise officials and that also will indicate that he was not having any knowledge of the articles transported in the vehicle. Further the prosecution has no case that the first accused had made any claim over the vehicle or the articles seized. So under the circumstances even assuming that the entire case of the prosecution is admitted he was travelling in the vehicle along with the driver in the cabin, that alone is not sufficient to come to the conclusion that he was in conscious possession of the contraband article said to have been transported in the vehicle and it was done with his connivance and it was he who has transported the same for the purpose of export of the Indian made foreign liquor manufactured at Karnataka. According to PW1, driver told him that articles were loaded by tea dust owners and it was packed by them and he was only transporting the same. If that be the case, investigation would have been conducted by the investigating officer as from where the articles were loaded, who loaded it, who was the owner of the contraband articles and for whose

benefit it was transported. They should have atleast conducted investigation as to who was the owner of the contraband article which has been transported and at whose instance it was transported and from where it was boarded etc and who was the owner of the vehicle as well. Such an attempt was not made in this case. So under the circumstances merely because the first accused was found in the cabin along with the driver alone is not sufficient to come to the conclusion that he was in conscious possession of the contraband article which was said to have been transported in that vehicle so as to connect him with the contraband articles and convict him for the offence under section 55(a) of the Abakri Act. This aspect has not been considered by the court below before coming to the conclusion that the first accused had committed the offence punishable under section 55(a) of the Abkari Act and consequential conviction entered by the court below 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 him giving him the benefit of doubt. In view of the finding that the appellant is entitled to get acquittal, the

sentence imposed by the court below also 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) of the Abkari Act are hereby set aside. The appellant is acquitted of the charge levelled against him giving him the benefit of doubt. The appellant is set at liberty. The bail bond executed by him stands cancelled. If any fine amount has been remitted by the appellant, the court below is directed to refund the same to the appellant on making necessary application in that regard.

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

Sd/-

K. RAMAKRISHNAN, JUDGE.

/true copy/

P.S to Judge

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