

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

WEDNESDAY, THE 2ND DAY OF SEPTEMBER 2015/11TH BHADRA, 1937

CRL.A.No. 2163 of 2005 ()

**S.C.No.154/2004 OF THE ADDITIONAL DISTRICT AND SESSIONS JUDGE, FAST TRACK
COURT No.1, (ADHOC), MANJERI.**

APPELLANT/ACCUSED:

**SOMAN, S/O.VASU PILLAI,
EDATHAZHU VEEDU, CHEMMANTHITTA,
EDAKKARA, MALAPPURAM DISTRICT.**

BY ADV. SRI.BABU S. NAIR

RESPONDENT/STATE:

**THE STATE OF KERALA,
REPRESENTED BY THE SUB INSPECTOR OF POLICE,
EDAKKARA POLICE STATION-THROUGH
THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM,
KOCHI-31.**

BY PUBLIC PROSECUTOR : SRI. JIBU P. THOMAS

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 02-09-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

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K. RAMAKRISHNAN, J

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Cr.Appeal No. 2163 of 2005

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Dated this the 2nd day of September, 2015

JUDGMENT

Accused in SC 154/2004 on the file of Addl. Sessions Court, Fast Track No.1), Manjeri, is the appellant herein. The appellant was charge sheeted by the Sub Inspector of Police, Edakkara, in crime no. 236/2003 of Edakkara Police Station under Section 55(a) and (g) of Abkari Act. The case of the prosecution nutshell was on 28.08.2003 at about 6.15 p.m, the accused was found to be in possession of wash a material used for manufacturing of arrack and also found engaged in distillation arrack in his house with no. IX/412(III/117) of Muthedam Panchayat in violation of the provisions of Abkari Act and thereby he had committed offences punishable under Section 55(a) and (g) of Abkari Act.

2. After investigation, final report was filed before the Judicial First Class Magistrate Court, Nilambur, and it was taken on file as C.P.No.122/2003 of that court. The learned Magistrate committed the case to Sessions Court, Manjeri, under Section 209 of Code of Criminal Procedure (hereinafter

called 'the Code') when it was taken on file as S.C.NO.154/2004 and thereafter it was made over to Addl. Sessions Court, Fast Track No.1, Manjeri, for disposal.

3. when the accused appeared before the court below after hearing both sides charge under Section 55(a) and (g) of Abkari Act was framed and the same was read over and explained to him and pleaded not guilty. In order to prove the case of the prosecution, Pws 1 to 8 were examined and Exts. P1 to P13 and MO 1 to MO 3 were marked. After closure of the prosecution evidence, the 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 was innocent of the same. 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 for the offences alleged and convicted him thereunder and sentenced to undergo rigorous imprisonment for 3 years and also to pay a fine of Rs. 1 Lakh, in default to undergo simple imprisonment for 6months . Aggrieved by the same, the present appeal has been preferred by the appellant/accused before the court below.

4. Heard the learned counsel for the appellant Ms.Nisha, representing Sri. Babu S. Nair, Advocate appearing for the appellant and Sri. Jibu P Thomas, Public Prosecutor, appearing for the State.

5. The counsel for the appellant submitted that the part of the investigation was conducted by another Sub Inspector, who had no jurisdiction over this area and as such the investigation is vitiated and the accused was entitled to get acquittal. She had also argued that the evidence is not sufficient to prove that the accused was found to be in possession of the article and he was engaged in distillation and he was in exclusive possession

of the house and as such the court below was not justified in convicting the appellant for the offence alleged. She had relied on the decision reported in Haridas Vs. State of Kerala (2015 (1) KLT 958) in support of her case.

6. On the other hand the learned Public Prosecutor submitted that the detection and final report were filed by the Sub Inspector who is having jurisdiction to detect filed final report. Even if the portion of the investigation was conducted by another Sub Inspector, which was later verified and after satisfaction the final report was filed by a competent officer, it cannot be said that the entire investigation is vitiated and on that ground, accused has to be acquitted. So the dictum laid down in the above decision is not applicable in the facts of this case. The Public Prosecutor relied on the decision reported in Saju @ Kochumon Vs. State of Kerala (2010 (3) KLT 471) in support of this case.

7. The case of the prosecution as emerged from the prosecution witnesses was as follows. On 28.08.2003 at

about 6.15 p.m while PW 1 along with PW7, the police constable attached to Edakkara Police Station were doing patrol duty, they got information that the accused was engaged in distillation of arrack from his house and immediately he sent ext. P1, search memo to court and thereafter went to the house of the accused along with Pws 2 and 3 the neighbours and independent witnesses and conducted the search of the house. At that time, he found the accused engaged in distillation of arrack from the kitchen of that house. There were none in the house except the accused at that time. He had verified the articles and found that in MO 2 cannas having 5 Ltrs, there was about 4 Ltrs of Arrack and he found MO 3, plastic bucket in which it contained 10 Ltrs of wash and in another bottle he found distilled arrack was collected. MO 3 series, aluminum vessels, wooden plank and plastic pipe were used for distillation of arrack. He had taken samples from the arrack found in MO 2 cannas, sealed the same and labelled the same by putting the signatures himself,

witnesses and the accused. Then he sealed the MO 2 kannas and labelled the same in the same fashion. Thereafter he had taken wash in a bottle MO 1 and sealed the same and labeled the same as mentioned above. Thereafter he had seized all these articles namely MO1, MO 2 and 3 series as per Ext.P3 search list in the presence of Pws 2 and 3. He arrested the accused and prepared Ext.P2 arrest memo and gave Ext.P5 arrest notice to his relative. He came to police station along with the accused and the articles seized and registered Ext.P4 First Information Report as crime no. 236/2003 of Edakkara Police Station under Section 55(a) (g) of Abkari Act against the accused. He had prepared Ext.P6 property list and produced the same before the court along with the contraband article seized with Ext.P7 forwarding note requesting to send the sample for analysis. He obtained Ext.P10 ownership certificate issued by PW5, the secretary of Moothedam Grama Panchayath. The investigation in this case was conducted by PW8 Vazhithala Sub Inspector of Police in the

absence of PW 1 as instructed by the higher officials. He questioned the witnesses and recorded their statements. He prepared Ext.P9 scene mahasar in the presence of PW 4 and another. He obtained Ext.P11 sketch plan for the place of occurrence as prepared by PW 6 the Special Village Officer. On the basis of requisition made by PW1, the samples were sent for chemical analysis and Ext.P12 report obtained which shows that it contained 25.27 and 38.07 % by volume of ethyl alcohol. Investigation conducted by PW8 was verified by PW1 and he submitted Ext.P13 final report before court, though it was marked through PW8.

8. Pws 2 and 3 are independent witnesses to the seizure. They admitted that they are neighbours of the accused and they have signed Ext.P2 search list as witnesses. But they had denied having seen the seizure. So it is clear from this that they are now trying to help the accused and that was the reason why they are not supporting the case of the prosecution. The prosecution relies on the evidence of witnesses Pw1 and 7 to prove

the seizure. PW1 is the detecting cum charging officer. He had deposed that on the fateful day while he was doing patrol duty along with Pw7, he got information that the accused was engaged in distillation of the arrack. Immediately he sent Ext.P1 search memo to court and thereafter proceeded to the place and conducted search in the presence of Pws 2 and 3 and seized Mos 1 to 3 series. He had also stated that when he entered the house, he found the accused engaged in distillation of arrack and he found 4 ltrs of arrack in MO2 plastic can of 5 ltrs capacity and the distillation process was in progress. He had also found 10 ltrs wash kept in plastic bucket. He had taken samples from the arrack found in the can and also collected the entire distilled arrack in a bottle and sealed the same and affixed labels containing signature himself witnesses and accused. He had also taken samples of wash in MO 1 bottle and sealed the same and labeled as stated above. Thereafter he had seized all these articles as per Ext.P1 search list. He arrested the accused and prepared Ext.P2

arrest memo.

9. Thereafter he came to police station along with the accused and the articles seized and registered Ext.P4 First Information Report against the accused. He had further stated that he had produced the articles before the court along with Ext.P6 property list and also gave Ext.P7 forwarding note with a request to send samples for analysis.

10. The evidence of PW1 on these aspects was corroborated by PW7 the police constable who accompanied by him. Though they were cross examined at length nothing was brought out to discredit their evidence on this aspect. Further the only suggestion given to them was that the house belongs to his father and no such detection was made. It is true in Ext.P10, the owner of the house was Vasu Pillai admittedly the father of the accused. It will be seen from the evidence of PW1 and except the accused none were there in the house at that time and he was engaged in distillation of arrack at that time, he was

arrested by PW1. So it is clear from the evidence PW1 that it is also brought out the evidence of PWs 2 and 3 that the accused was residing in the house. So merely because the ownership stands in the name of another person alone is not sufficient to come to the conclusion that the accused was not in possession of the house especially when the evidence showed that he was in actual possession of the house and engaged in distillation of arrack and he was arrested by PW1 and handedly at the time when he was engaged in distillation.

11. It is settled by law that merely because attestor to search list turned hostile is not a ground to disbelieve the search and seizure affected by the detecting officer. If the court is satisfied with the evidence of the official witnesses on this aspect, there is nothing wrong for the court to rely on the same for proving search and seizure. There is nothing brought out to discredit the evidence of the Pws 1 and 7 regarding this aspect. So the court below was perfectly justified in coming to the conclusion that the

accused was found engaged in the distillation and rightly convicted him for the offence for distillation of arrack punishable under Section 55(b) of Abkari Act. Though no charge was framed for that purpose, the allegation will go to show that the offence will fall under Section 55(b) of Abkari Act and so the court below was perfectly justified in convicting him for distillation of arrack which is punishable under Section 8(1) r/w Section 8(2) of Abkari Act after the amendment.

12. There was no delay in producing the article. The articles were produced before court in the next day itself and the description seen in the property list tallies with the description mentioned in the search list as well. So there is not possibility of tampering of the article and the prosecution has proved that the same article which was seized were the articles produced in the court and Ext.p12 chemical analysis report relates to the representative samples taken from the contraband article seized from the possession of the accused.

13. It is true that part of the investigation was conducted by PW8 who was not having jurisdiction over the area from where the offence was detected. It is true that in the decision reported in (2015 (1) KLT 958) Haridas Vs. State of Kerala, this court had held that since the investigation was conducted by another person who is not having jurisdiction in area in which offence is committed, it will vitiate the investigation and as such he is entitled to get discharge. None of the decision were referred to in the decision rendered in Haridas case, so as to come to such a conclusion. But in the decision referred in Saju @ Kochumon Vs. State of Kerala (2010 (3) KLT 471) it has been held that a Sub Inspector of Police as authorised to act as Abkari Officer can exercised his jurisdiction only within the territorial limits of his police station. The final report laid by another Sub Inspector who is not having jurisdiction over that territorial area is illegal and cognizance taken on that basis is bad in law. So it is clear from the above dictum that the final report has to be filed by the person

competent to file the final report and it is filed by some other person then it is vitiated and no cognizance can be on the basis of such final report.

14. In this case though the part of the investigation was conducted by another Sub Inspector of Police who cannot be treated as an abkari officer for the purpose of conducting investigation within the territorial jurisdiction of the place where the offence was committed, it was later verified by PW 1 himself and it was he who had filed the final report which is seen from the evidence of PW 1 and also from Ext.P13 final report filed in the case. So under the circumstances, since the final report was filed by the competent person, taking cognizance of the case on the basis of that report is perfectly justifiable. Further in this case the seizure and arrest of the accused have been found to be just and proper and legal which was proved through Pw1. So the dictum laid down in Haridas case is not strictly applicable to the facts of this case. So the court below was perfectly justified in convicting the appellant for

the offence of manufacturing of arrack which is punishable under Section 8(1) r/w Section 8(2) of Abkari Act and rightly not given any separate sentence for the offence under Section 55(a) and (g) of Abkari Act. The finding of the court below on this aspect do not call for any interference.

15. The counsel for the appellant submitted that the sentence imposed is harsh. The court below sentenced the accused to undergo rigorous imprisonment for 3 years and also to pay fine of Rs. 1 lakh, in default to undergo simple imprisonment for 6 months. The persons committing offences under the Abkari Act are committing the offence knowing fully well that it is an offence. Further they are doing this ignoring the impact of their act on innocent persons who are likely to consume such illegally manufactured arrack. So under such circumstances, showing undue leniency in sentencing such persons will only give a wrong message. But the accused was aged only 41 years at the time of committing the offence and there was so case for the prosecution that he was a habitual

offender involved in such offence. Further long time has lapsed after the trial of the case as well. He will be more than 60 years now. So considering the circumstances, I feel retaining the fine and the default sentence of 6 months and reducing the substantive sentence of one year's simple imprisonment will be sufficient and that will meet the end of justice. So the substantive sentence is reduced to one year's rigorous imprisonment and the sentence is modified as follows. The appellant is sentenced to undergo rigorous imprisonment for one year and also to pay a fine of Rs. 1 lakh and in default to undergo simple imprisonment for 6 months.

In the result the appeal is allowed in part. The order of conviction entered by the court below and also fine imposed with default sentence are hereby confirmed. The substantive sentence of 3 years rigorous imprisonment is set aside and the same is reduced to one year rigorous imprisonment. So the sentence is modified as follows. The appellant is sentenced to undergo rigorous imprisonment

for one year and also to pay a fine of Rs. 1 lakh, in default to undergo simple imprisonment for 6 months. Set off is allowed for the period of detention already undergone by him in this case. Office is directed to communicate the order to the concerned court immediately.

K. RAMAKRISHNAN, JUDGE.

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