

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

THURSDAY, THE 8TH DAY OF OCTOBER 2015/16TH ASWINA, 1937

CRL.A.No. 2197 of 2005 ()

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SC 637/2000 of ADDL. SESSIONS COURT, FAST TRACT(ADHOC)-II, TRIVANDRUM
DATED 09-11-2005**

APPELLANT(S)/ACCUSED::

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VIDHYADHARAN, S/O SREEDHARA PANICKER
SARITHABHAVAN, KOTTAKKAM MURI, ARYANAD VILLAGE.**

BY ADV. SRI.SUMAN CHAKRAVARTHY

RESPONDENT(S)/COMPLAINANT & STATE::

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

R1 BY PUBLIC PROSECUTOR SMT.SEENA RAMAKRISHNAN

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 08-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

VS

K.RAMAKRISHNAN, J.

Criminal Appeal No.2197 of 2005

Dated this the 8th day of October, 2015

JUDGMENT

Accused in S.C.No.637/2000 on the files of the Additional Sessions Court, Fast Track (Adhoc) No.II, Thiruvananthapuram, is the appellant herein. The appellant was chargesheeted by the Sub Inspector of Police, Aryanad Police Station in Crime No.108/99 of that police station under Section 55(a)(b) [ought to be under Section 8(I) & (II)] of the Abkari Act.

2. The case of the prosecution in nutshell was that on 18.05.1999 at about 12 noon, the accused was found to be in possession of 9 litres of arrack, in a kannas and holding a bottle and glass and also found to be in possession of Rs.54/-, from the tea shop, near the Gurumandiram at Kottakkakam, in violation of the provisions of Abkari Act and thereby he had committed

the offence punishable under Sections 55(a)(b) the Abkari Act.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court I, Nedumangadu, where it was taken on file as C.P.No.50/2000. After complying with formalities, the learned Magistrate committed the case to the Sessions Court, Thiruvananthapuram, under Section 209 of the Code of Criminal Procedure (hereinafter called 'the Code' for short). After committal, the case was taken on file by the Sessions Court as S.C.No.637/2000 and it was originally made over to Additional Sessions Court, Nedumangad for disposal.

4. When the accused appeared before that court, learned Assistant Sessions Judge, after hearing both sides, framed charge under Section 55(a)(b) of Abkari Act against the accused 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 Additional Sessions Judge, Fast Track (Adhoc) No.II, Thiruvananthapuram for disposal.

5. In order to prove the case of the prosecution, PWs 1 to 5 were examined and Exts.P1 to 6 and Mos 1 to 7 were marked on their side. 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 had 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 not guilty for the offence under Section 55(b) of the Abkari Act and acquitted him of that charge under Section 235(1) of the Code, but found him guilty under Section 55(a) of the Abkari Act and convicted

him thereunder and sentenced him to undergo rigorous imprisonment for 2 years and also to pay a fine of Rs.1,00,000/-, and in default to undergo simple imprisonment for 3 months. Set off was allowed for the period of detention already undergone under Section 428 of the Code. Aggrieved by the same, the present appeal has been preferred by the accused/appellant before the court below.

6. Heard Smt.Brijitha Unnikrishnan, counsel representing Sri.Suman Chakravarthy counsel for the appellant and Smt.Seena Ramakrishnan, learned Public Prosecutor appearing for the State.

7. Counsel for the appellant submitted that the independent witnesses in the seizure did not support the case of the prosecution. Further, there was delay in producing the articles before the court and that was not properly explained. The samples said to have been taken from the spot has not even produced before the court and it is not known as to who had taken the sample, when it

was taken and when it was sent etc as well. So under the circumstances, the findings of the court below that the prosecution has proved the case against the accused is unsustainable in law and the conviction entered by the court below is not sustainable and the appellant is entitled to get acquittal.

8. On the other hand, the learned Public Prosecutor submitted that the delay in producing the articles has been explained by PW5 and the sample was taken and the proceedings of taking sample has been recorded by the Magistrate in the property list. So, it cannot be said that the prosecution has failed to prove the link between the accused and the contraband articles, as contended by the counsel for the appellant and the conviction entered by the court below is perfectly legal.

9. The case of the prosecution as emerged from the prosecution witnesses was as follows: on 18.05.1999 at about 12 noon, PW3, the Circle Inspector of police, Aryanad got information that the accused was selling

arrack from his tea shop. Immediately, he along with PW4 and party came to the shop of the accused and found a car stopped in front of the shop bearing Reg.No.KL.01-5482 and three persons came out of the tea shop and came near the said car. On seeing the police party, the accused who was inside the shop tried to run away from the place with MO1 kannas, MO2 bottle and MO3 glass. Immediately they stopped him and he disclosed his name as Vidhadharan @ Vidhan and he also told that the article in the kannas was arrack. He had verified the kannas and found that it contained 9 litres of some liquid. On an examination by smelling and tasting, he was satisfied that it was arrack. He verified MO2 bottle and found that it was also having the smell of arrack and the glass was also having the same smell. So, he arrested the accused and took sample and sealed and labelled the bottle and the kannas, in the same fashion and affixed labels on MO2 bottle and MO3 glass. On conducting body search of the accused, he found that an amount of Rs.54/- was there in

his pocket, which contained different denomination of currency notes and coins, which was identified as MOs 4 to 7. He arrested the accused and brought him to Aryanad Police station along with the contraband articles and entrusted the same to PW5, the Sub Inspector of Police, who gave Ext.P3 report before him and it was sent through PW4. On the basis of Ext.P3, PW5 registered Ext.P4 First Information Report, as Crime No.108/99 of Aryanad Police station, against the accused under Section 55(a)(h) of Abkari Act. He prepared Ext.P5 property list and gave a requisition to take samples and sent it for analysis accordingly and produce the articles before court. Ext.P6 chemical analysis report was obtained. He produced the accused along with Ext.P3 remand report. He questioned the witnesses and recorded their statements and he completed the investigation, submitting final report.

10. PWs 1 and 2 are the alleged independent witnesses to the seizure. Though, they admitted their

signatures in Ext.P1, they denied having seen the actual seizure. According to them, they signed the seizure mahazar from the police station. PWs 3 and 4 have deposed about the arrest of the accused and seizure of MOs 1 to 7, from the possession of the accused. Though, they were cross examined at length, nothing was brought out to discredit the evidence on this aspect. It is settled law that merely because the witnesses in the seizure turned hostile, is not a ground to disbelieve the prosecution case. If the court is satisfied with the evidence of official witnesses, court can rely on the same for proving the seizure. So, under the said circumstances, the court below was perfectly justified in relying on PWs 3 and 4 and rightly came to the conclusion that accused was arrested along with Mos 1 to 7.

11. Mere arrest of the accused with some kannas and liquid alone is not sufficient to convict the accused. It must be proved by the prosecution that the articles seized from the possession of the accused are the

same articles reached in court in tamper free condition and the chemical analysis report relates to the samples said to have been taken from the contraband seized from possession of the accused.

12. In the decision reported in **Sasidharan v. State of Kerala** [2007 (1) KLT 720], this Court has held that unless the link between the accused and the contraband articles is established by the prosecution, it cannot be said that the prosecution has succeeded in bringing home the complexity of the accused with a commission of the crime. In the same decision, it has been observed that if the sample is drawn from court, then the committal Magistrate has to prepare a separate proceedings regarding drawing of sample, packing of the same and sending the same to chemical examiners laboratory in a tamper free condition and that can be done by examining the concerned thondi clerk, who had done these things under the orders of the Magistrate. The Sessions Judge has ensure to examine the thondi clerk to

prove this fact and the Public Prosecutor in charge of the case must take steps to examine that person by filing additional witness list, to prove the fact that the sample drawn was the sample taken from the contraband article seized.

13. In this case, it will be seen from Ext.P5 property list that the articles reached the court on 20.05.1999. PW5 had no explanation as to why the delay occurred in producing the articles. Further, he had also deposed that he did not send the sample which was said to have been drawn by the detecting officer namely PW3 from the spot, along with the property list and he had made a request to take sample from court and sent the same for the chemical analysis. He had further stated he did not know who had taken the sample, when it was taken and when it was sent from court. So it is clear from this, that the sample said to have been taken by PW3 from the contraband article seized had not reached the court. Further, no evidence was adduced on the side of the

prosecution to prove as to who had taken the sample from the contraband article and whether it has been sent in a proper condition, so as to conclude that the chemical analysis report Ext.P6 relates to the representative sample said to have been taken from the contraband article, alleged to have been seized from the possession of the accused. In this case, the concerned thondi clerk was not examined to prove these aspects. Though, there is an endorsement in the property list that permission will have to be given for taking sample and sent it for analysis and it was granted by the Magistrate, that alone is not sufficient to prove that sample was taken from the alleged contraband article and it reached the chemical examiners laboratory in a tamper free condition, without examining the concerned clerk who had performed these acts.

14. Further, in the decision reported in **Ravi v. State of Kerala** [2011 (3) KHC 121], the Division Bench of this Court held that mere delay in producing the article is not always fatal, if it is properly explained and if

explanation is satisfactory to the court, court can ignore the delay. But, if the delay is not explained, then that benefit must be given to the accused. In this case, the delay of 2 days in producing the article has not been explained by PW5 and he had categorically stated that there was no hurdle for him to produce the articles along with the property list, before court along with the accused. Further, since, he had not produced the sample bottle which has been taken from the spot by PW3 along with the property list, it cannot be said that the articles reached the court in a tamper free condition and the chemical analysis report relates to the representative samples that has been taken from the contraband article, alleged to have been seized, from the possession of the accused and that benefit must be given to the accused. These aspects were not properly explained to the court below, before coming to the conclusion that the prosecution has proved the case against the accused, that he was in possession of arrack and consequential

conviction entered by the court below against the accused 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.

15. In view of the finding that the accused is entitled to get acquittal, the sentence imposed by the court below is not proper and the same is liable to be 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 is hereby set aside. The appellant 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 cancelled. 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. Office is directed to

communicate this judgment to the concerned court immediately.

Sd/-
K.RAMAKRISHNAN
JUDGE

VS

/TRUE COPY/

PA TO JUDGE