

"CR"

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

WEDNESDAY, THE 14TH DAY OF OCTOBER 2015/22ND ASWINA, 1937

CRL.A.No. 2226 of 2005 ()

AGAINST THE JUDGMENT IN SC 190/2005 of ADDL.DISTRICT COURT (ADHOC),
KOTTAYAM DATED 29-11-2005

APPELLANT/2ND ACCUSED:

V.P.RAJAPPAN, S/O.PAPPY,
VALIYAMADOM AATTUCHIRA HOUSE, PARIPPU KARA,
AYMANOM VILLAGE, KOTTAYAM TALUK.

BY ADVS.SRI.V.K.SUNIL
ADV.CHANDRABABU(LEGAL AID COUNSEL)

RESPONDENT/COMPLAINANT:

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

BY PUBLIC PROSECUTORSRI.JIBU P.THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 14-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

“CR”

K. RAMAKRISHNAN, J.

.....
Crl.A.No.2226 of 2005

.....
Dated this the 14th day of October, 2015.

JUDGMENT

The second accused in S.C. No.190/2005 on the file of the Additional Sessions Court (Adhoc)-I, Kottayam is the appellant herein. The appellant along with his son were charge sheeted by the Excise Circle Inspector, Kottayam in Crime No.2/2002 of Ettumanoor excise range under sections 55(g) and 64 A of the Abkari Act.

2. The case of the prosecution in nutshell was that on 11.3.2002 at about 8.20 a.m the second accused being the owner of the house and first accused being his son were found to be in possession of 40 litres of wash, a material used for manufacturing arrack, and it was kept there with the connivance of the second accused, owner of the house and thereby they have committed the offences punishable under sections 55(g) and 64 A of the Abkari Act.

3. After investigation, final report was filed before the

Judicial First Class Magistrate Court, Ettumannor where it was taken on file as C.P.No.13/2005. After complying with the formalities, the case was committed to the Sessions Court, Kottayam by the learned Magistrate under section 209 of the Code. After committal, the case was taken on file as SC.No.190/2005 and it was made over to the Additional Sessions Court (Adhoc)-I, Kottayam for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under sections 55(g) and 64 A of the Abkari Act was framed and the same was read over and explained to them and they pleaded not guilty. In order to prove the case of the prosecution, Pws 1 to 8 were examined and Exts.P1 to P9 and MO 1 were marked on their side. After closure of the prosecution evidence, the accused were questioned under section 313 of the Code and they denied all the incriminating circumstances brought against them in the prosecution evidence. They have further stated that they have not committed any offence and they are innocent of the same and they have 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 were called upon to enter on

their defence. But no defence evidence was adduced on their side. After considering the evidence on record, the court below found the first accused not guilty of the offence alleged and acquitted him of that charge giving him the benefit of doubt under section 235 (1) of the Code. But the court below found the appellant not guilty for the offence under section 64 A of the Abkari Act and acquitted him of that charge but found him guilty under section 55 (g) of the Abkari Act on the basis of the presumption available under section 64 of the Act and convicted him thereunder and sentenced him to undergo simple imprisonment for 6 months and also to pay a fine of Rs. One lakh in default to undergo simple imprisonment for three months 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/accused before the court below.

5. Since there was no representation for the counsel appearing for the appellant in spite of opportunity given, Sri. A.Chandra Babu was appointed as legal aid counsel. Heard Sri. A.Chandra Babu, legal aid counsel and Sri. Jibu P. Thomas, Public Prosecutor appearing for the State.

6. The legal aid counsel submitted that there is no evidence to connect the appellant with the commission of the crime. Merely because he is the owner of the house, it cannot be said that he was in conscious possession of the article said to have been seized from the house. It is seen from the evidence that only the first accused was seen there in the house and he ran away from the place on seeing the excise party and thereafter they caught hold of him and arrested him from the spot and seized the articles. Only thereafter on the basis of the document collected showing that the house stands in the name of the appellant, he has been implicated in the case. Further, the case alleged against him was that he had committed the offence under section 64A of the Abkari Act and not offence under section 55(g) of the Abkari Act as he was not found to be in possession of any article and they have not seen him handling the articles as well. So the finding of the court below that he had committed the offence punishable under 55(g) is unsustainable in law and he is entitled to get acquittal. If for any reason this Court finds that he has got knowledge about the article being kept in the house by his son, he can only be proceeded for the offence under section 64A of the Abkari

Act for which alone he was charge sheeted by the investigating agency.

7. On the other hand, the learned Public Prosecutor submitted that he being the owner of the house, the court below was perfectly justified in coming to the conclusion that he was in constructive possession of the house and the contraband articles were kept in the house and rightly invoked the presumption under section 64 of the of the Abkari Act and convicted him for the the said offence.

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

On 11.3.2002, at about 8.20 p.m, when PW1, the Circle Inspector of Excise attached to Kottayam Excise Enforcement and Anti Narcotic Squad was doing patrol duty along with his excise party, he got information that wash was kept in the property of second accused. Immediately he sent Ext.P1 search memorandum to court and reached the place for the purpose of conducting search of the house. At that time, he saw the first accused in the house with No.III/411 of Ayamanam panchayath and on seeing the excise party, he ran away from

the place through the back side of the house and immediately they chased him, caught hold of him, came to the house and conducted search and he did not find any contraband article inside the house. But when he examined the house compound, he found MO1 cannas having 50 litres of capacity kept in the shed covered with straw. When he removed them, he found that it contained 40 litres of some liquid, which he, on examination, satisfied that it was wash. So he had taken 300 ml liquid from the cannas in a 750 ml bottle and sealed the same and labelled the same with the signatures of witnesses, accused and himself and destroyed the remaining wash, sealed and labelled the cannas also in the same manner and seized the same as per Ext.P2 mahazer in the presence of Pws 2 and 3. Thereafter he arrested the first accused from the spot and came to Ettumanoor excise range office and entrusted the articles to PW8, the Excise Inspector, who registered Ext.P6 crime and occurrence report as Crime No.2/2002 against the first accused alone under section 55(g) of the Abkari Act. He produced the accused before court along with the remand report. He prepared the property list and produced the articles seized before court along with the property list. He sent requisition for

sending sample for analysis along with the forwarding note and on the basis of the same, sample was sent for analysis and Ext.P7 chemical analysis report obtained which shows that article seized was wash and it contained 10.21% by volume of ethyl alcohol.

9. Investigation in this case was conducted by PW8. He questioned the witnesses and recorded their statements. He collected Ext.P3 certificate issued from the Village Officer, PW4, in which it was stated that second accused was in possession of the house and also obtained Ext.P4 certificate given by PW5, Secretary of the grama panchayath stating that the second accused was the owner of the house. Since there was some discrepancy in the name of the second accused mentioned in Ext.P4, he obtained Ext.P5 certificate issued by PW6, another Village Officer, stating that they are one and the same person and thereafter gave a report to add second accused also in the case and to add section 64A of the Abkari Act as well. He completed the investigation and submitted final report.

10. Since the court below had acquitted the first accused, who was arrested from the house with the contraband articles

against whom alone originally the crime was registered, I am not going into the question regarding legality of the search as State has not filed any appeal against the order of acquittal of the first accused in this case.

11. Then the only question as to whether the court below was justified in convicting the appellant for the offence under section 55(g) of the Abkari Act especially when the prosecution itself has no case that he had committed that offence and he had been charge sheeted only for the offence under section 64 A of the Abkari Act. There is no dispute regarding the fact that the second accused was the owner of the house from where the contraband articles were seized. It is also in a way admitted by the prosecution witnesses including the detecting officer and the investigating officer that at the time of seizure, except the first accused, none were there in the house and the article was seized not from inside the house but from a shed which was kept in a concealed position. There was no evidence adduced on the side of the prosecution to prove that the second accused was also residing in the house and he was in exclusive control of the house or the property. They have not verified even the ration card of the house. The evidence of PW5, the

Village Officer, is not helpful to prove that the second accused was in possession of the house. He had not verified any document for giving a certificate in the nature of Ext.P3 stating that he was in possession of the house in the property. Further in Ext.P4 certificate given by the panchayath Secretary also, it was only mentioned that it stands in the name of the second accused and it was not stated that he was the occupier of the building. There is no evidence adduced on the side of the prosecution to prove that it was with the connivance of the second accused or with the help of the second accused that the contraband article was stored in the house or in the property. Merely because he was the owner of the house, in the absence of any evidence to show that he was residing in the house and he was having exclusive control over the house, it cannot be said that prosecution has proved beyond reasonable doubt that he was in possession of wash so as to convict him for the offence under section 55(g) of the Abkari Act as found by the court below in view of the dictum laid down in the decision reported in ***Ravi C. v. State of Kerala*** (2011 (3) KHC 427), where it has been observed that the detecting officer, investigating officer or the court shall not proceed on the

presumption or assumption that the owner or occupier of the building has stored it or he is in possession only because a contraband article was seized from a building or house belonging to him. There is a duty cast on them to ascertain the overtact committed by the accused which makes him liable for the offence. In this case, there is no evidence adduced on the side of the prosecution to prove that the appellant was having any domain over the contraband article seized so as to infer that he was in conscious possession of the article seized or to infer even that he is constructive possession of the same. So the observation made by the court below that he being the owner of the house, he is liable to be convicted for the offence under section 55(g) is unsustainable in law and the same is liable to be set aside and he is entitled to get acquittal of the charge levelled against him.

12. Section 64 A of the Abkari Act reads as follows:

64A. Penalty for allowing land, building, room etc. For manufacture, sale or storing for sale of liquor or intoxicating drug:- Notwithstanding anything contained in this Act, or in any other law for the time being in force, any owner or occupier or person having control of, any land,

building, room, space or enclosure, permits any person to use such land, building room, space or enclosure for manufacture sale or storing for sale of liquor or intoxicating drug in licence or permit obtained under this Act shall be punishable with fine which shall not less than twenty-five thousand rupees unless he proves to the satisfaction of the court that all due and reasonable precautions were taken by him to prevent such use".

13. In order to attract that offence, it must be proved by the prosecution that storing of the article in the property belonging to the owner of the house was done with his connivance or consent. In the decision reported in **Ravi's case** (cited supra), this Court has held that the presumption under section 64 Abkari Act cannot be drawn in respect of an offence under section 64A of the Abkari Act. So in order to attract an offence under section 64 A of the Abkari Act, the prosecution has to establish that the accused was having knowledge of storing of contraband article in his house and that was done with his consent or knowledge. In this case except the fact that the second accused was the owner of the house, there is nothing on record to show that he was residing in the house along with the first accused and he had knowledge

about storing of contraband article in the house by the first accused. It will be seen from the evidence that the contraband article was not seized from the house but from a shed situated in the property in a concealed position by covering with straw. So under the circumstances, no knowledge or consent can be attributed to the second accused for keeping of such article in the house belonging to him so as to attract offence under section 64 A of the Act and the court below also found that section 64 A is not attracted as prosecution had no case that it was concealed there or it was kept there with the consent or connivance of the second accused which does not call for any interference. So under the circumstances, the conviction entered by the court below against the appellant for the offence under section 55(g) of the Abkari Act is unsustainable in law and the same is liable to be set aside and he 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, then the sentence imposed by the court below is also 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(g) of the Abkari Act are set aside and he is acquitted of the charge levelled against him giving him the benefit of doubt. He is not liable to be convicted for the offence under section 64 A of the Abkari Act as well. So he is set at liberty. The bail bond executed by him stands cancelled. The lower court is directed to refund the fine amount, if any, remitted by the appellant to him on making necessary application in that regard.

Office is directed to communicate a copy of this judgment to the concerned court immediately.

Sd/-

K. RAMAKRISHNAN, JUDGE.

/true copy/

P.S to Judge

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