

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

FRIDAY, THE 18TH DAY OF SEPTEMBER 2015/27TH BHADRA, 1937

CRL.A.No. 2228 of 2005 ()

**AGAINST THE JUDGMENT IN SC 326/2004 of ADDITIONAL DISTRICT COURT (ADHOC),
PALAKKAD DATED 05-12-2005**

APPELLANT(S)/ACCUSED NO.1.:

**K.R.VINOD @ KOCHU, S/O.RAMAKRISHNAN,
KIDANGATTU HOUSE, GOOLIKKADAVU, AGALI.**

BY ADV. SRI.C.C.THOMAS (SR.)

RESPONDENT(S)/COMPLAINANT.:

**STATE OF KERALA, REPRESENTED BY
SUB INSPECTOR OF POLICE, MANNARKKAD, PALAKKAD
DISTRICT, REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.**

R BY PUBLIC PROSECUTOR SMT.SEENA RAMAKRISHNAN

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 18-09-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

AD

K.RAMAKRISHNAN, J

Crl.A No. 2228 of 2005

Dated this the 18th day of September, 2015

JUDGMENT

The accused in SC No.326/2004 on the file of the Additional Sessions Judge, Fast Track Court-I, Palakkad is the appellant herein. The appellant along with another person was charge sheeted by the Sub Inspector of Police in Mannarkkad Police Station in crime No.151/02 of that Police Station under Section 55(a) of Abkari Act.

2. The case of the prosecution in nutshell was that on 09.04.2002, at about 3.00 a.m, the accused were found to be in possession of 440 litres of toddy in three plastic drums and unauthorisedly transporting the same in a jeep with No.KL-6-9261 at Anamooli in Agali-Mannarkkad road without any documents in violation of the provisions of the Abkari Act and thereby they have committed the offence punishable under Section 55(a) of Abkari Act.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court

Mannarkkad and then the case was taken on file as C.P 11/03. The learned Magistrate committed the case to Court of Sessions Palakkad under Section 209 of Code of Criminal Procedure (herein after called 'the code'). After committal, the Sessions Court took cognizance the case as SC No.326/2004 and it was originally made over to the Assistant Sessions Court, Ottappalam for disposal. Thereafter it was withdrawn by the Sessions Judge and made over to Additional Sessions Judge, Fast Track Court-I, Palakkad for disposal.

4. When the accused appeared before the Court below, charge under Section 55(a) of Abkari Act was framed and the same was read over and explained to them and then they pleaded not guilty. In order to prove the case of the prosecution, Pws 1 to 5 were examined and Exts.P1 to 6 marked on their side. After conclusion 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. 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 that the 2nd accused not guilty of the offence alleged and acquitted him the charge leveled against him giving benefit of doubt under Section 235(1) of the code. But the Court below found the appellant guilty under Section 55(a) of the Act and convicted him there-under and sentenced him to undergo rigorous imprisonment for two years and also to pay fine of Rs.1,00,000/- in default undergo simple imprisonment for six months more. Set off was allowed for the period of detention undergone by him in this case under Section 428 of the Code. Aggrieved by the same, the present appeal has been preferred by the appellant, the 1st accused before the Court below.

5. Heard, Sri.Nitheesh Mathew the Counsel representing, the Senior Counsel Sri.S.S.Thomas advocate

to appellant and Smt.Seena Ramakrishnan, the learned Public Prosecutor representing the State.

6. The Counsel for the appellant submitted that in this case, no material objects were produced before the Court and identify by the witnesses. The property list was not marked. There is no explanation forthcoming from the side of the prosecution for non production of the material objects before the Court and non production of the same has caused prejudice to the accused as Court will be loosing the opportunity of satisfying itself that the article seized were the same article produced before the Court and satisfying witnesses identity by the Court. Further the ownership of the vehicle, who is the owner of the goods that has been transported, for whom it was transported etc were investigated by the Investigating Officer. That shows that the investigation was not proper and they are trying to protect some one behind the commission of the crime and accused have been falsely impleaded in the case. Further he also argued that no attempt was made by the Investigating Officer to find out even as to whether

it is a taxi vehicle or a private vehicle. If it is a taxi vehicle and if any article was transported, it is not necessary that the driver must know about the contents of the article transported. Unless on examination of the same itself, it could be gathered that it is a contraband article. So under the circumstances, it cannot be said that the driver of the vehicle was in conscious possession of the contraband article and has *mens rea* in transporting the same and thereby he had committed the offence so as to convict him for the said offence. Further he also argued that in seizure mahazar, it was mentioned that the preservative Benzoic acid was added, but in the chemical analysis report nothing mentioned about the presence of preservative. That also give an indication that the prosecution failed to prove that the report relates to the sample alleges to have been collected from the alleged contraband article seized from the possession of the accused. He had relied on the decision reported in ***Narayana Velichappada V. Sub Inspector of Police and Another 2007 (4) KHC 748*** and ***Makhan Singh V.***

State of Haryana 2015 (3) KLT SN 68 (C.No.92) SC in support of this case. He also submitted that the appellant is entitled to get acquittal.

7. On the other hand, the learned Public Prosecutor submitted that the ownership of the vehicle is not material especially when the article was seized while it was being transported by the 1st accused as driver of the vehicle. Further it is for him to prove for whose benefit the article has been transported etc and he had no knowledge about the contents of the article seized. Non production of the material object is not fatal especially when the property list was produced before the Court on the same day along with the contraband article and they were returned to the Station House Officer for safe custody. So under the circumstances, the Court below was perfectly justified in convicting the appellant for the offence alleged. No interference is called for.

8. The case of the prosecution as emerged for the prosecution witnesses was that on 09.04.2002 PW1 along with PW4 and others were doing patrol duty and

also vehicle checking duty at Anamooli in Agali-Mannarkkad road, on the basis of the information obtained about unauthorised transporting of toddy, through the road. At about 3 a.m, they saw jeep with No.KL-6-9261 came from Agali side to Mannarkkad side. They stopped the vehicle and inspected the same. They found the 1st accused was the driving the vehicle and the 2nd accused was sitting in the vehicle. When they examined the vehicle, they found that there were three cans, one of the can containing 200 liters, the second containing 190 liters and third one containing 50 liters of some liquid. When they had examined the same, they were satisfied that it was toddy. Thereafter PW1 had taken two samples of 700 ml each from each container (total 6 samples), sealed the same and labelled the same containing the signature of himself, witnesses and the accused. He had sealed the cannas and labelled the same as the same fashion and seized the same as per Ext.P1 mahazar in the presence of PW3 and PW4, independent witnesses. He had arrested both the accused evidenced

by Ext.P2 arrest memo. He has also seized the vehicle after describing the same in the mahazar. Thereafter he came to Police Station and registered Ext.P3 First Information Report as crime No.151/02 of Mannarkkad Police Station under Section 55(a) of the Abkari Act. The investigation in this case was conducted by PW5, the Additional Sub Inspector of Police. He questioned the witnesses and recorded the statements. He prepared Ext.P4 scene mahazar in the presence of witnesses. He produced the accused before the Court along with the remand report and they were remanded to custody. He sent Ext.P5 forwarding note with request to send samples for analysis and the same was send for analysis and Ext.P6 chemical analysis report obtained. He completed the investigation and submitted the final report.

9. PWs 3 and 4 are the independent witnesses of the seizure and they did not admit the witnessing of the seizure and PW4 was denied his signature in Ext.P1 mahazar, though PW3 admitted his signature in Ext.P1. No attempt was made to confront the signature in the

summons or any other documents available to show that the signature seen in Ext.P1 was of that person.

10. Then the evidence is only that of PWs 1 and 2, the Investigating Officer and the accompanying Officer. PW1 was the Sub Inspector of Police at the relevant time. He along with PW2, the Constable and others was doing vehicle checking duty on 09.04.2002 from 1.45 am onwards at the place of occurrence and by about 3.00 am, they saw the jeep No.KL-6-9261 coming from Agali side through the road. It was driven by the 1st accused and they stopped the vehicle for checking. when the vehicle was stopped and on examination of the vehicle they found that there were three drums, one containing 200 liters of some liquid while other two drums containing 190 liters and 50 liters respectively of similar liquid. Thereafter he examined the contents of the container and satisfied that it was toddy. so he arrested the accused persons and prepared Ext.P2 arrest memo. He had taken two samples of 700ml each from each container and sealed the same and labelled the same with signature of the accused,

witnesses and himself and he sealed and labelled the container also in the same fashion and seized the same as per Ext.P1 mahazar. Thereafter he came to Police Station along with the accused and the contraband articles and registered the crime. He had admitted in the cross examination that he was not aware as to whether the vehicle is private vehicle or a taxi jeep. He did not verify any document relating to the same as well. The evidence of PW1 was corroborated by the evidence of PW2, the police Constable who accompanied him. Though they were cross examined at length, nothing was brought out to discredit their evidence regarding the arrest and seizure of the drums with liquid said to be toddy. So the Court below was perfectly justified, on the basis of decisions reported in ***Tahir V. State of Delhi (AIR 1996 SC 3079)*** and ***Karamjith Singh V. State (Delhi Admn.) (AIR 2003 SC 1311)*** in relying on the evidence of PWs 1 and 2 and rightly came to the conclusion that the prosecution was able to establish that three drums alleged to be containing toddy was seized from the jeep

driven by the 1st accused in which 2nd accused was also present.

11. But that alone is not sufficient to convict the accused for the offence unless prosecution proves the link between the contraband article seized with the accused. In this case, the contraband articles were not seen produced and marked before the Court so as to get an opportunity for the Court to verify the same that the articles produced were the same articles said to have been seized from the possession of the accused and they were properly identified by the persons who had seized the same as well. The Investigating Officer who was examined as PW5 also did not state anything as to what happened to the article seized and produced before the Court but entrusted to them for safe custody. Though the learned Public Prosecutor read out some reports said to have been filed by the Investigating Officer before the Court seeking permission to destroy the toddy seized, no documents has been produced as to what happened to that application and any orders have been passed on that

application. However even the remaining samples said to have been kept in the custody of the Station Officer were not produced as well. Nothing mentioned in the judgment as to the non production of those article also. Unless the contraband article or the container in which it was stored and transported were produced before the Court for the purpose of satisfying itself that the same articles were produced before the Court without any tampering, it cannot be said that the prosecution is proved the case against the accused beyond reasonable doubt.

12. In the decision reported in **Narayana Velichappada** (supra), this Court has held that non production of the contraband article and non production of other material before the Court would show that the alleged seizure was not proved and that benefit must be given to the accused.

13. Further no attempt was made by the Investigating Officer to find out the ownership of the vehicle or the nature of the vehicle whether it is a private vehicle or taxi jeep, so as to come to a conclusion that the

1st accused was a exclusive possession and domain of the vehicle or the article said to have been seized. If it is a taxi vehicle and the articles were transported by a passenger and if it is not possible for the driver to come to a conclusion that what is transported in the drums is toddy or other contraband article, then it cannot be said that he was in conscious possession of that article and knowing that it was contraband article that has been transported in the vehicle with that knowledge. If he is not unaware of the nature of the article transported by the passenger who was found to be with him but acquitted by the court below, then it cannot be said that he had transported the alleged contraband article knowing that it was an contraband article. There is a duty cast on the prosecution to prove this fact which has not been done in this case. There is no evidence to show from where the contraband article was transported and from where it was boarded in the vehicle as well. The 2nd accused was acquitted by the Court below on the ground that prosecution could not prove from where he had boarded

the vehicle and has loaded the contraband article. If he was the real person who had boarded the contraband article and transporting the same in the jeep, then the 1st accused cannot be convicted for conscious possession of the article as well.

14. It is true that the ownership of the vehicle need not be always material but when the vehicle was driven by a driver for hirer without knowing the nature of article transported in the vehicle by a person travelling in the vehicle, then it cannot be said that he was in conscious possession of that article and consequently transported the same so as to convicting for the offence under Section 55 (a) of the Abkari Act. So merely because 1st accused was driving the vehicle, which contained, according to the prosecution was contraband article, he cannot be convicted unless it is proved by the prosecution that he was conscious about the article transported in the vehicle that it was contraband article and with that knowledge he had transported the same. These aspects were not considered by the Court below before coming to

the conclusion that the prosecution has proved beyond reasonable doubt that the accused was in conscious possession of contraband article and transported the same with that knowledge and thereby he had committed the offence.

15. However it is seen from the evidence that Benzoic acid was added as preservatives but in Ext.P6 chemical analysis report there is nothing mentioned about the presence of any preservative or any test has been conducted to find out whether any preservatives was present or not. That also gives an indication that it is not the same sample that has been sent for analysis said to have been seized from the possession of the accused and that benefit also must be given to the accused. These aspects were not properly considered by the Court below, before coming to the conclusion that the prosecution has proved the case against the accused beyond reasonable time and consequential conviction entered by the Court below for the offence alleged is also unsustainable and the same is liable to be set aside. The appellant is

entitled to get acquittal of the charge leveled against him giving him the benefit or doubt. Since this Court has found that the accused is entitled to get acquittal, the sentence imposed is also not proper and same is also liable to be set aside.

In the result, the appeal is allowed. The order of conviction and sentence passed by the Court against the appellant under Section 55(a) of the Abkari Act are hereby set aside and he is acquitted of the charge leveled against him, giving him the benefit of doubt. He is set at liberty. The bail bond executed by him will stand cancelled. The fine amount if any remitted by him is directed to be returned to him on making necessary application by the Court below. Office is directed to communicate with the concerned Court immediately.

Sd/-
K.RAMAKRISHNAN
JUDGE

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P.A. TO JUDGE

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