

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

THURSDAY, THE 17TH DAY OF SEPTEMBER 2015/26TH BHADRA, 1937

CRL.A.No. 2261 of 2005

**S.C.NO.184/2002 OF ADDITIONAL DISTRICT & SESSIONS COURT (ADHOC)-II,
KOLLAM**

**C.P.NO.55/2001 OF JUDICIAL FIRST CLASS MAGISTRATE COURT,
KARUNAGAPPALLY**

APPELLANT(S)/ACCUSED :

**SUNDARESAN, SON OF SURENDRAN,
KALEETIL VEEDU, KOLATHU MURI, PANAMANA VILLAGE
KARUNAGAPPALLY.**

BY ADV.

RESPONDENT(S)/COMPLAINANT :

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

BY PUBLIC PROSECUTOR SRI.JIBU.P.THOMAS

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 17-09-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

Msd.

K.RAMAKRISHNAN, J.

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Crl. Appeal No.2261 OF 2005

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Dated this the 17th day of September, 2015

JUDGMENT

The accused in SC No.184/2002 on the file of the Additional Sessions Court (Adhoc-2) Kollam is the appellant herein. The appellant was charge sheeted by the Excise Inspector, Karunagappally in Crime No.46/1998 of that Excise Range against the accused under Section 55(a) and 67(b) of the Abkari Act.

2. The case of the prosecution in nutshell was that on 6.5.1998 at about 7 pm the accused was found to be in possession of 2.850 litres of illicit arrack in three 750 ml. bottles and also possessed a glass for the purpose of sale of liquor and stored it in his LML Vespa Scooter with No.KL 2 E 5753 in front the Tea Shop of one Surendran adjacent to the road leading to Kolathumuk to National Highway Kolam Muri, Ponmana Village in violation of the provisions of the

Abkari Act and thereby he had committed the offences punishable under Section 55(a) and (8(1) and (2) of the Abkari Act.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court, Karunagappally, where it was taken on file as CP. No.55/2001. The learned Magistrate committed the case to the Sessions Court, Kollam under Section 209 of Code of Criminal Procedure (hereinafter referred to as the Code). After committal, the Sessions Court took cognizance of the case as SC No.184/2002 and it was originally made over to Additional Assistant Sessions Court Kollam and thereafter it was withdrawn and made over to Additional Sessions Court (Adhoc-2) Kollam for disposal by the Sessions Judge.

4. When the accused appeared before the court below after hearing both sides charge under Section 8(1) of the Abkari Act was framed and the same was read over and explained to him and he pleaded not guilty. In order to

prove the case of the prosecution PWs 1 to 7 were examined and Exts.P1 to P4 and MOs 1 to 5 were marked and 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 no article was seized from his possession and he has been falsely implicated in the case. He had further stated that he was doing raring of milk by profession and at about 4 pm, he went to the Tea Shop, at that time the Excise party was inspecting the Tea Shop and he was taken by the Excise party along with his father alleging that they were engaged in sale of arrack and they produced him before the court after two days. 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 under Section 8(1) 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 rigorous imprisonment for one year. Set off was allowed for a period of detention already undergone by him under Section 428 of the Code. Aggrieved by the same, the present appeal has been preferred by the appellant/accused before the court below.

5. Heard Sri. Lio George, learned counsel for the appellant and Sri. Jibu P. Thomas learned Public Public Prosecutor appearing for the State.

6. The counsel for the appellant submitted that there are discrepancies in the evidence of PWs 3 and 4 regarding the manner in which mahazar was prepared and that creates some suspicion regarding the seizure and arrest. Further when the independent witnesses of seizure turned hostile, then the evidence of official witnesses has to

be cautiously evaluated by the court before accepting the same. He had also argued that there was no spot sample taken and it will be seen from the documents produced that on the date of production itself it was returned to the officials and it was produced later after a period of 6 months and there was no evidence adduced on the side of the prosecution to prove from which bottle the sample was taken, who had taken the sample etc. Further it is seen from the chemical analysis report that the covering letter was dated 16.11.1998, whereas it reached the chemical examiner only on 24.11.1998. That also caused some suspicion regarding the genuineness of the articles produced and it cannot be said that the prosecution has proved the link between the articles seized and the accused so as to convict him for the offence alleged.

7. On the other hand the learned Public Prosecutor submitted that there was no delay in producing the article and the sample was taken from the court and it was sent for

chemical analysis laboratory from court. So the court below was perfectly justified in convicting the appellant for the offence alleged.

8. The case of the prosecution as merged from the prosecution witnesses was as follows:-

On 6.5.1998 at about 7 pm. PWs 3 and 4 preventive officer along with another preventive officer and Excise guard were doing patrol duty and when they reached the place of occurrence, they saw the accused holding glass in his hand, when he saw the excise party, he tried to go away from that place. So they stopped him and on verification of the glass, they found that it was coloured arrack. They opened the box of the scooter with the help of a key and found 3 more bottles of 750 ml. of similar liquid. So they sealed the bottles. When they examined the contents of all the bottles they were satisfied that it was coloured arrack. They arrested the accused and sealed the bottles and seized the same as per Ext.P1 mahazar in the presence of PWs1

and 2. They also seized the scooter as per same mahazar and came to the Excise office and produced the same before PW4 the Excise inspector who registered Ext.P2 occurrence report and also prepared Ext.P3 property list and produced these articles before the court along with property list. Thereafter he had produced the accused also on the same date before the Magistrate along with remand and he was remanded to custody. PW6 had conducted the investigation regarding the ownership of the scooter but he could not find out the owner of the scooter. So he had produced the same before the Assistant Excise Commissioner for necessary action for initiating proceedings of confiscating the vehicle. According to the prosecution, sample was taken from the court and it was sent for analysis and Ext.P4 report obtained and PW7 conducted further investigation of the case after PW6 and completed the investigation and submitted final report in court.

9. PWs 1 and 2 who are independent witnesses to the seizure though admitted the signature and on the basis of acquaintance with the accused, did not support the case of the prosecution regarding the seizure of articles from the possession of the accused. They also admitted the signature in the arrest memo. 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.

10. Then the evidence available is that of PWs 3 and 4 who accompanied the detecting officer and the detecting officer himself. PW4 was the detecting officer in the case. He had narrated the manner in which the arrest was recorded, seizure was effected and preparation of mahazar. It was corroborated by the evidence of PW3 as these aspects. It is true that there is some discrepancy regarding the nature of light used for the preparation of the mahazar but that alone is not sufficient to disbelieve their case as

such, especially when PWs 1 and 2 have admitted their signature in Ext.P1 and also in the arrest memo. Though the accused had a case that he was arrested earlier and kept in illegal custody for 2 days and thereafter he was produced before the court, there is no evidence adduced to prove these facts. On the other hand document produced will go to show that he was arrested on 6.5.1998 and produced before the court on the same day and he was remanded to custody. So the court below was perfectly justified in relying on the dictum laid down in the decision reported in Mary v State of Kerala [2005(4) KLT 39] and also Karanjit Sing v State of Delhi [AIR 2003 SC 1113] and rightly came to the conclusion that if the court is satisfied with the evidence given by the Excise officials though the seizure witnesses are hostile, nothing wrong to rely on their evidence to convict the accused on the basis of evidence given by the official witnesses and rightly came to the conclusion that prosecution has proved beyond reasonable

doubt that the accused was arrested along with a scooter and MO1 to 5.

11. Merely because the accused was arrested along with some bottles containing liquor alleged to be arrack alone is not sufficient to convict him for the offence for the possession of arrack. It must be proved by the prosecution that they have produced the same article and the chemical analysis report related to the article said to have been seized from the possession of the accused. In this case admittedly there was no spot sample taken. It is seen from Ext.P4 chemical analysis report that sample of 180 ml. liquid reached to the chemical examiners laboratory and it contained 40.30% by volume of ethyl alcohol. The letter of the Magistrate is dated 16.11.1998 and reached the office of the chemical examiner on 20.11.1998. Further in this case there was no spot sample taken, it is seen from the property list that the articles were returned to the Excise officials for keeping safe custody. It is not known as to

when the sample was taken, from which bottle the sample was taken, when the requisition was given by whom it was given etc.

12. In the decision reported in Sasidharan v State of Kerala [2007 (1) KLT 720] it has been held that the prosecution has a duty to prove, that it was the sample taken from the contraband liquor seized from the accused which had reached the hands of the chemical examiner in a tamper proof condition and without linking the evidence of actual sampling by the concerned clerk of the court drawing the sample from the can and sending the same in a sealed packet to the chemical examiner with a specimen seal separately for tamper proof dispatch, the prosecution cannot be held to have brought home the offence against the appellant. Further in the same decision it has been observed that the committing Magistrate have to take care that contemporary proceedings evidencing this drawing of sample and sending the same to chemical examiners in a

tamper proof condition has to be recorded in the proceedings before the court. The Sessions Judge trying such case also, to ensure that the concerned member of the staff who had drawn the sample and despatched the same to the chemical examiner duly packed and sealed under the covering letter of the Magistrate is examined before the court during trial. Learned Public Prosecutor in charge of the case also had a duty to file an additional witness list in the case for examining the Thondi Section Clerk concerned so as to establish the nexus between the contraband substance and the accused.

13. In this case no such procedure was adopted before coming to the conclusion that the chemical analysis report relates to the representative sample taken from the contraband article alleged to have been seized from the accused. Unless this link established by the prosecution it cannot be said that the prosecution has proved beyond reasonable doubt that the accused had committed the

offence. Court below had not considered these facts before coming to the conclusion that the prosecution had proved beyond reasonable doubt that the accused was found to be in possession of 2.850 litres of illicit arrack and consequential conviction entered by the court below against the appellant under Section 8(1) of the Abkari Act is unsustainable in law. The same is liable to be set aside. So the appellant is entitled to get acquittal of the charge leveled against him giving him the benefit of doubt.

14. In view of the finding that the accused is entitled to get acquittal sentence imposed is also not proper and the same is also liable to be set aside. So it is also set aside.

In the result the appellant succeeds and appeal is allowed. The order of conviction and sentence passed by the court below against the appellant under Section 8(1) of the Abkari Act are hereby set aside. The appellant 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 the appellant is directed to be refunded to him on making necessary application in this regard before the court below.

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

Sd/-

K.RAMAKRISHNAN, JUDGE

SKV