IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE K.HARIPAL

FRIDAY, THE 11TH DAY OF JUNE 2021 / 21ST JYAISHTA, 1943

CRL.A NO. 800 OF 2011

AGAINST THE JUDGMENT DATED 09.05.2011 IN SC 446/2008 OF ADDITIONAL DISTRICT & SESSIONS JUDGE(ADHOC), FAST TRACK NO. I, PATHANAMTHITTA

APPELLANT/ACCUSED NO. 1:

GOPINATHAN, AGED 48 YEARS
S/O.KESAVAN,
RESIDING AT KOCHUPURAYIL HOUSE,
MANAKKAYAM MURI, PERUNAD VILLAGE,
RANNI TALUK, PATHANAMTHITTA DISTRICT.

BY ADVS.
SRI.V.SETHUNATH
SRI.PRAKASH KESAVAN

RESPONDENT/COMPLAINANT/STATE:

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

BY SRI. M.S. BREEZ, SENIOR PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 07.04.2021, THE COURT ON 11.06.2021 DELIVERED THE FOLLOWING:

JUDGMENT

This is an appeal preferred under Section 374(2) of the Code of Criminal Procedure, hereinafter referred to as the Cr.P.C., challenging the correctness of the judgment dated 09.05.2011 of the Additional Sessions Court, Pathanamthitta (Fast Track – I) in S.C. No. 446/2008. That case had originated on a final report laid by the Sub Inspector, Perunad police station in Pathanamthitta district, in Crime No.28/2007, alleging offence punishable under Sections 55(g) and 8(1) and (2) of the Abkari Act. The allegation is that on 25.02.2007 at 9.10 a.m., the Sub Inspector, Perunad police station and party found the appellant, who is the first accused in the crime along with six others, engaged in manufacturing arrack in a place by name Kochethupara in Perunad village and Manakayam muri within Ranni taluk in Perunad police station limits. Knowing about the illegal activities of the appellant and others, police party proceeded to the place; after keeping the vehicle on the Puthukkad-Manakayam public road they walked about 600 metres to the place of occurrence. Near a small watercourse, the appellant and others were found engaged in manufacturing arrack. All the paraphernalia used by them were also

seen; seeing the police, all of them tried to run away from the place, the police chased them but only the appellant could be apprehended. After taking him back to the place of occurrence, the items were seized under a mahazar and he was arrested from the place, taken to the police station and the crime was registered. According to the prosecution, they found the accused engaged in manufacturing of arrack in a remote area, 40 litres of arrack was found kept in two jars of 20 litres each; at some distance about 3750 litres of wash was also seen concealed under the bushes in 250 tins each containing 15 litres each. Samples were collected from the jars and the wash, remaining wash was destroyed at the place itself, the first accused/appellant was arrested from the place and then the crime was registered. The appellant and other material objects were produced before court on the following day and after investigation, the charge sheet was laid before the Judicial First Class Magistrate, Ranni.

2. The learned Magistrate after perusing the records took cognizance of the case as C.P. No. 166/2007 and after completing the procedural formalities, committed the case to the Court of Session, Pathanamthitta, where the case was taken on file as S.C. No.

446/2008; the case was then made over to the trial court. The appellant and other accused persons were on bail. After hearing counsel on both sides, when the charge was framed, read over and explained in Malayalam, they pleaded not guilty. They were defended by their counsel of choice.

3. On the side of the prosecution three witnesses were examined. They are a police constable who was in the party who detected the crime and apprehended the culprits, an independent witness, and the Sub Inspector, who led the police team, who conducted investigation and laid the charge sheet. Exts. P1 to P10 were marked on the side of the prosecution. Material objects were identified and marked as MOs 1 to 5. After completing the prosecution evidence, when examined under Section 313(1)(b) of the Cr.P.C., the appellant and others denied the entire incriminating circumstances; the appellant contended that he was arrested by the police from his residence while he was asleep.

4. As it is not a fit case for acquittal under Section 232 of the Cr.P.C., the accused were called upon to enter on their evidence in defence. However, no evidence was adduced by them. After hearing

counsel on both sides, by the impugned judgment, accused Nos. 3 to 7 were found not guilty and were acquitted. The second accused was no more and charge against him was abated. But the charge against the appellant was found proved, he was found guilty, and convicted under Sections 55(g) and 8(1) and (2) of the Abkari Act and was sentenced to undergo rigorous imprisonment for five years on both heads and also fined Rs.1,00,000/- each, in default to undergo rigorous imprisonment for one year each. This finding has been called in question before this Court in appeal.

5. I heard the learned counsel for the appellant and also the learned Senior Public Prosecutor. The trial court records were summoned and examined.

6. According to the learned counsel for the appellant, the prosecution could not establish that the appellant was actually found in possession of so much quantity of arrack or wash. There is no constructive possession proved against him. For this purpose the counsel relied on the decision reported in **Sajeevan v. State of Kerala [2020(6) KLT 53]**. Secondly, the Ext.P1 seizure mahazar does not bear sample seal, so that, on that ground also the prosecution case

should fail. To support this version, he relied on the decision in **Nadarajan v. State of Kerala [2020(3) KLJ 633]**. He also pointed out that there is only the supporting evidence of PWs 1 and 3, police officials. PW2, the independent witness has turned hostile to the prosecution and in the circumstance, it was not proper on the part of the Sessions Court to place reliance on PWs 1 and 3. On the other hand, the learned Senior Public Prosecutor supported the finding of the court and opposed the appeal.

7. On 25.02.2007 PW1 M.R. Vijayakumar was police constable in Perunad police station. He fully supported the prosecution case. According to him, that day at 8.30 a.m., he along with Sub Inspector and other party had proceeded to the place and reached Manakayam, by about 9.00 a.m. At the SNDP junction, they parked the vehicle on the road and proceeded through the ridge of the Kochethupara thodu, which is a watercourse. After proceeding about 600 meters, they saw some persons standing at the place and also a hearth using three stones, over which one aluminum pot and above it, two vessels were kept. There was fire in the hearth. Seeing the police party, all the persons stood there ran towards east, the police party

chased them, but except the first accused, who is the appellant, others could not be apprehended. When they examined the place, they saw arrack making process in progress. Two jars were found kept by the side of the place containing about 40 litres of arrack, 20 litres each in the jars. Then at some distance away, 250 tins of wash, each containing 15 litres, were found concealed under the bushes. The contents of the jars and the tins and also the aluminum pot were examined by tasting and smelling and they understood that the jars contained arrack. Similarly, arrack making was in progress. A tube was found connected from the pot above the hearth to a glass bottle and half of the bottle contained colourless liquid; that was also found arrack; samples were collected, the wash was destroyed and the appellant was arrested from the place.

8. PW2, P.O. Rajan is running a workshop of cars and jeeps. He admitted his signature found on the Ext.P1 mahazar; he said that he had signed on the label fixed on MO2 jar also. However, he denied having witnessed the prosecution allegation and thus, was declared hostile to the prosecution and was cross examined by the prosecutor.

9. PW3 T.R. Pradeep Kumar is the Sub Inspector, who

detected the offence. He gave a version fully in conformity with that of PW1, the police constable. He also proved Exts.P1 to P10 documents. It was he who prepared the Ext.P1 seizure mahazar, arrested the appellant from the place of occurrence, registered the crime, produced the material objects before court and prepared the forwarding note to the court; he also prepared the remand report by which the appellant was produced before court and also proved the chemical examination report which shows that the sample and the wash were offensive articles. Going by Ext.P9 report, the samples contained 7.66, 24.48 and 11.77 percent by volume of ethyl alcohol respectively. It was also pointed out that the samples collected from the jars were smelling arrack and that of the sample collected from the wash was smelling wash. Thus by the Ext.P9 report, the police could confirm that the appellant and others were engaged in making arrack and on that basis they formed a final opinion and laid the charge sheet before court.

10. Even though PWs 1 and 3 were rigorously cross examined by the learned counsel for the defence, nothing could be brought out in evidence to discredit their veracity. PWs 1 and 3 were discharging

their official duties; they have no malice or ill-will against the appellant. Even the appellant has no case that they have any previous acquaintance with him, so that they were cooking up a false case against him.

11. Now coming to the decision reported in **Sajeevan's** case (supra), relied on by the learned counsel for the appellant, I am not convinced that, that decision has any application with the facts of the case. There the learned Single Judge was dealing with a case in which the allegation was that the said Sajeevan, the appellant was found engaged in selling arrack. Even though at the time of detection, he had carried a glass tumbler with him, there was nothing to say that he was in actual possession of the objectionable item seized in the case. At the time when the detecting officer approached the said Sajeevan, there were about ten persons in the locality and seeing the police, all of them except the said Sajeevan had run away from the place. On the facts of the case, the court found that there was no reason to connect the appellant with the contraband, and there was no reason to find that he was in possession of arrack as found by the trial court.

12. Here the facts are totally different. As noticed earlier, the

police party had proceeded to the place of occurrence on getting reliable information about illegal distilling of arrack in a remote place near a forest area. After parking the vehicle at the SNDP junction, the police party proceeded to the place by foot. After proceeding about 600 meters, they found a group of persons engaged in manufacturing of arrack. All necessary paraphernalia were available in the area. When they reached the place, a hearth was live with fire; a big aluminum pot of 100 litres capacity was found on the hearth, about half of it contained wash, above it, there was another aluminum vessel, inside there was an earthen pot from which a tube was connected to a glass bottle and on the third layer there was a big aluminum vessel containing plain water. Fire was active in the hearth, arrack was being produced and was being flown into the bottle through the tube connected from the second aluminum vessel placed on the hearth. In fact, that is the way in which arrack is being manufactured indigenously. Thus there was every reason for the police party to find that illegal manufacturing of arrack was in progress by a group of persons. They also found 40 litres of arrack stacked in two jars, besides the hearth. Similarly, at some distance

about 3750 litres of wash was kept concealed under the bushes. In other words, large scale making of arrack was in progress. It was a remote area. Seeing the police party all the persons stood around ran away from the place which itself is a matter of adverse inference. But the appellant alone could be nabbed by the police after a chase. He was taken back to the place of occurrence and he had related the names of all his cronies and thereafter, the case was registered. But the other persons were acquitted since they were not arrested and their identity was not proved during trial. The appellant alone was arrested from the place of occurrence, he was produced before court on the following day itself. Both PWs 1 and 3 identified him before court.

13. Even though the appellant contended that he was arrested from his house, the Ext.P6 remand report does not reflect such a statement. He was produced before court on 26.02.2007, on the following day at 11.15 a.m.; it was the earliest possible opportunity afforded to him to express his version about the arrest. If he was arrested from the place of residence in contrast to the prosecution version, he would have certainly stated to the Magistrate that he was arrested from his house, that he has no connection whatsoever with the

allegation. Such a statement has not been given. That fact alone is sufficient to belie his version that he was falsely implicated in the crime. As noticed earlier, there is no motive for the same.

14. That means, the prosecution version can be believed. Secondly, he had run away from the place seeing the police party. If he was innocent and had happened to be there by chance, there was no necessity for him to run away from the place seeing the police party. Oral evidence of PWs 1 and 3 indicate that he was actively involved in the making of arrack and that was why he had tried to flee from the place, seeing the police. The fact that the appellant was found in a remote place in the midst of such objectionable items, all paraphernalia for making arrack were found, the making of arrack was in progress; 40 litres of arrack was found from the place, speak volumes about his culpability. Similarly, large quantity of wash was also found concealed near the place of occurrence. All these aspects clearly indicate that the appellant was engaged in making of arrack, with the assistance of others, which attract offence punishable under Section 55(g) of the Abkari Act. On the very same premises, the allegation that he was found in possession of arrack also can be found

against him. It is true that he was not carrying arrack at the time of the arrest. But at the time when the police had reached there, making of arrack was in progress, manufactured arrack was found from the place, he had run away from the place seeing the police, all these are circumstances which entitled the prosecution to draw adverse inference against the appellant with regard to possession of arrack and therefore, offence under Sections 8(1) and (2) of the Abkari Act also is possibly found against him.

15. The contention that forwarding note did not bear official seal has no factual basis, since Ext.P8 bears sample seal of the Sub Inspector of the police. Secondly, the decision in **Nadarajan**'s case (supra) has no application. In fact there is no law that the seizure mahazar should bear the seal. In the decision also there is no such dictum. Paragraph 17 of the judgment, which was highlighted by the learned counsel, only shows that the Ext.P1 in that case and the testimony of PW2 are silent about the nature of the seal. That does not *ipso facto* lead to the conclusion that seal should be there on the seizure mahazar. If the supporting materials are sufficient to say that the mahazar was prepared contemporaneously from the place of

occurrence at the time of detecting the offence and seizing the items, there is absolutely no meaning in saying that the mahazar should bear the seal.

16. It is true that PW2 independent witness had turned hostile to the prosecution. But PW2 has partly supported the case; he has stated that he had signed the Ext.P1 mahazar, but denied having witnessed the occurrence. Normally, such independent witnesses do not support the prosecution case. But the fact that he has admitted having signed the document itself strengthens the version of the prosecution case that a contemporaneous document was prepared at the time of detecting the crime.

17. On considering the totality of the materials and evidence, I do not find any reason to disbelieve the version of the prosecution. The grounds urged in support of the appeal cannot sustain and I find that the learned Additional Sessions Judge has correctly found the appellant guilty and absolutely no reasons are made out for striking a different note and interfere with the finding of conviction. I confirm the same.

18. Turning to the sentences, I feel that the sentence imposed

is disproportionate to the guilt found against the appellant. The incident had happened way back on 25.02.2007, about 14 years before. Due to institutional lapses, the matter could not be finalised yet. At that time, the appellant was only 45 years old and now he is more than 62 years and therefore, leniency is required in the matter of sentence. Therefore, the sentence requires modification. The sentence is modified and reduced to rigorous imprisonment for two years under Section 55(g) of the Abkari Act. He is also liable to pay Rs.1,00,000/- as fine, each in both counts, in default, he shall suffer rigorous imprisonment for six months. Having regard to the circumstances, I do not think that separate sentence be imposed for the offence punishable under Section 8(1) of the Abkari Act.

Subject to the above modification, the appeal is dismissed.

Sd/-
K.HARIPAL
JUDGE

DCS/23.04.2021