

(2012) 11 KL CK 0139
In the High Court Of Kerala
Case No : Criminal A. No. 144 of 2005 (A)

Mohan Nair

APPELLANT

Vs

The Excise Inspector, Konni Range and The State of Kerala

RESPONDENT

Date of Decision : 28-11-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 428

Citation : (2012) 11 KL CK 0139

Hon'ble Judges : N.K. Balakrishnan, J

Bench : Single Bench

Advocate : Rajesh K Raju State Brief, for the Appellant; Jasmine V.H., Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

Justice N.K. Balakrishnan

1. This appeal is directed against the conviction and sentence passed against the appellant for offence punishable under Sec.8(1) r/w 8(2) of Abkari Act. He was sentenced to R.I. for 2 years and to pay Rs. 1 lakh as fine and in default to S.I. for 2 years. Since the Learned Counsel for the appellant who filed the appeal did not turn up to argue the matter, Mr. Rajesh K. Raju was appointed as State Brief to argue the appeal.

2. Heard Sri. Rajesh K. Raju, the State Brief appearing for the appellant and also the learned Public Prosecutor.

3. The case of the prosecution is that; while PW1, the Preventive Officer, PW3, the Excise Guard and other officials were on patrol duty on 17.10.1999 at about 12 Noon, the accused was found walking along the road from Poomkavu to V. Kottayam with a black can of a capacity of 5 litre. Since the appellant was found jittering he was intercepted. The can was examined. It was found to contain 2 litres of illicit arrack. It was so identified by smell and taste. From the said liquid 300 ml was taken as sample in a bottle of 375 ml. That sample bottle was

sealed. Besides, the plastic can containing the residue was also sealed then and there. Labels containing the signature of the accused and of the witnesses were affixed on the sample bottle and also on the can containing the residue. The accused was arrested then and there, for which Ext.P2 arrest memo was prepared. Ext.P1, the seizure mahazar was also prepared. On the same day, the accused was produced before the learned Magistrate along with the occurrence report and the seizure mahazar. The property list (Ext.P5) was also produced before the learned Magistrate on the same day. It was noted that the plastic can mentioned above and the sample bottle were in a sealed and labelled condition. It was so noted in Ext.P5 as well. The evidence given by PW1, the Preventive Officer which was supported by PW3, the Excise Guard. Two independent witnesses did not support the prosecution. Independent witnesses do show the propensity to turn hostile in such cases because of host of reasons. But that is not a reason to reject the evidence given by PWs.1 and 3, the officials who prepared the contemporaneous records as mentioned above. The very fact that the accused and all the records and the properties were produced before the court on the same day would vouch for the correctness of the action taken by PW1.

4. Learned Counsel for the appellant Sri. Rajesh K. Raju, the State Brief submits that since the independent witnesses did not support the prosecution, the court below should not have acted upon the evidence given by PWs.1 and 3. It is also argued by Sri. Rajesh K. Raju that though the records were prepared by the Assistant Excise Inspector one Mr. Muralidharan, he was not examined and so, that also is fatal to the prosecution.

5. But the learned Public Prosecutor submits that PW1, the Preventive Officer who detected the case has given evidence and has proved all the contemporaneous records and since that is corroborated by the evidence given by PW3, there was no necessity to examine other witnesses. It is also pointed out that the label affixed on MO1 can was shown by PWs.1 and 3 when they were examined in court. It was specifically noted that it contained the signature of the accused. At the time of trial, it could be found that since two holes developed at the bottom portion of the can the liquid in it had flown out. Therefore, the Learned Counsel for the appellant submits that the benefit of doubt should be given to the accused. Since the label containing the signature of the accused was still visible, the contention to the contrary advanced on behalf of the accused cannot be sustained. It was reported as per Ext.P7 that the liquid contained 28.49% by volume of ethyl alcohol. Therefore, I hold that the liquid seized from the possession of the accused was arrack. Since the appellant was carrying arrack, I find that the court below has rightly found the appellant guilty of the offence under Sec.8(2) of Abkari Act. Learned Counsel for the appellant submits that the appellant was a TB patient and he actually suspected that it was the beginning of cancer. Therefore, considering all the aspects, jail sentence may be avoided, the Learned Counsel submits. Considering the totality of the circumstances, I find that sentence can be modified.

In the result, this CrI. A. is disposed of as stated below :-

The conviction is confirmed.

In supersession of the sentence awarded by the trial court, the appellant is sentenced to S.I. for one month and to pay Rs. 1 lakh as fine and in default of payment of the same, the appellant will undergo S.I. for three months. Set off is allowed under Sec.428 of Cr.P.C.