

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE V.K.MOHANAN

THURSDAY, THE 31ST DAY OF MAY 2012/10TH JYASHTA 1934

CRL.A.No. 100 of 2007

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[AGAINST THE ORDER DATED 25.11.2006 IN SC.255/2004 of THE COURT OF  
ADDL.DISTRICT AND SESSIONS JUDGE, FAST TRACK (ADHOC II), KOZHIKODE]

APPELLANT(S) /ACCUSED:

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LAL SEBASTIAN, S/O.DEVASSIA,  
AGED 36 YEARS, THOONKUZHIYIL HOUSE  
CHEMBANODE AMSOM DESOM, KOYILANDY, KOZHIKODE.

BY ADV. SRI.NIDHI BALACHANDRAN

RESPONDENT(S) /COMPLAINANT:

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

BY PUBLIC PROSECUTOR SRI.P.M.SANEER.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 31-05-2012,  
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**V.K.MOHANAN, J.**

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**Crl.A.No. 100 of 2007 B**  
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Dated this the 31<sup>st</sup> day of May, 2012

**J U D G M E N T**

The above appeal is preferred by the sole accused in S.C.No.255 of 2004 in the court of Additional District and Sessions Judge, Fast Track (ADHOC II), Kozhikode, challenging the judgment dated 25.11.2006 in the above sessions case by which the appellant is convicted under Section 8(1) and (2) of the Abkari Act.

2. The prosecution case is that on 25.6.2002, PW1, the Assistant Excise Inspector of Police, Balussery Excise Range and his party were conducting patrolling through Perambra-Chakkittapara area, at about 5.30 p.m., when they reached at Thazhathuvayal Equator, they got reliable information with regard to sale of arrack by the accused in front of the house of Parakkapoil Mukundan and accordingly, they went to that place. When they reached there, they saw the accused coming with 2½ litre plastic can and he was intercepted and examined the plastic can and on further examination

of the same, by tasting and smelling, they realised that the liquid contained therein is arrack. Thus, according to the prosecution, the accused has committed the above offence.

3. After arrest of the accused and seizure of the contraband article, crime No.18 of 2002 was registered in the Balussery Excise Range and after completing the investigation, a report was filed before the Judicial First Class Magistrate Court-II, Perambra from where the case is committed to the Sessions Court where S.C.No.255 of 2004 is instituted and finally, made over the case for disposal to the present trial court. Thus, during the trial of the case, PWs.1 to 5 were examined and Exts.P1 to P7 were marked from the side of the prosecution. MO1 can was also identified and marked. No evidence either oral or documentary was adduced from the side of the defence. The trial court finally found that the prosecution has satisfactorily proved the case beyond reasonable doubt and accordingly, the accused is found guilty under Sections 8(1) and (2) of the Abkari Act and he is

convicted thereunder. On such conviction, he is sentenced to undergo rigorous imprisonment for a period of two years and to pay fine of ₹1 lakh and in default, he is directed to undergo rigorous imprisonment for six months. Set off is allowed under Section 428 of Cr.P.C. It is the above finding and order conviction and sentence challenged in this appeal.

4. I have heard Sri.Nidhi Balachandran, learned counsel for the appellant and also the learned Public Prosecutor.

5. As I indicated earlier, to prove the prosecution allegation, the prosecution mainly depends upon the evidence of PW1, the then Assistant Excise Inspector of Police of Balussery Excise Range who detected the crime. When he was examined, he had deposed in terms of the prosecution allegation. He had deposed that when himself and party were on patrol duty, on receiving information, went to the side of Kuttiyadi river and the accused was found coming with a 2½ litre plastic can with full of liquid which on interception, inspected and the

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same was realised as arrack by smelling and tasting. According to PW1, the accused was arrested as per Ext.P1 arrest memo and he had also stated that samples were drawn from the contraband article and the entire proceedings were described in Ext.P2 seizure mahazar. According to him, after the arrest of the accused and the seizure of the contraband article, he reached the Excise Officer and handed over the accused and the contraband articles to the Excise Inspector, Balussery Excise Range. PW2 had also deposed in tune with the deposition of PW1, and PW2 is the Excise Guard of Balussery Excise Range who accompanied PW1 during the time of the detection, PW3 the Excise Inspector, the Balussery Excise Range has also deposed in terms of the prosecution case and supported the evidence of PWs.1 and 2. According to PW3, he prepared Ext.P3 occurrence report, Ext.P4 remand report, Ext.P5 property list and Ext.P6 forwarding note. These documents are marked through PW3. Ext.P7 is the chemical analysis report according to which, the sample contains 18.32% of

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ethyl alcohol. PWs.4 and 5 are signatories to Exts.P1 and P2, who turned hostile. These are the evidence referred to by the learned Judge in his judgment and relied on to convict the appellant.

6. The learned counsel for the appellant submitted that the alleged incident had taken place on 25.6.2002 on which date, according to the counsel, the Assistant Excise Inspectors were not empowered to perform the duties mentioned in Sections 40 to 53 of the Abkari Act and therefore, the seizure and arrest of the accused are illegal and the accused is entitled to get acquittal. Learned Public Prosecutor also conceded fairly that the Assistant Excise Inspectors were empowered to perform the duties mentioned in Sections 40 to 53 of the Abkari Act only with effect from 8.5.2009 and during the time of the incident in the present case, they were not empowered.

7. In the light of the above submission of the learned counsel for the appellant and the learned Public Prosecutor, according to me, I need not go into other aspects of the prosecution case and its merits.

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In the present case, admittedly, PW1, who was then working as Assistant Excise Inspector attached to the Balussery Excise Range, happened to reach at the place of occurrence and detected the crime on 25.6.2002 by which, according to the prosecution, the appellant was found in possession of 2½ litres of arrack. A learned Judge of this Court in the decision reported in **Parathi Sasidharan v. State of Kerala** [ILR 2012 (2) Kerala 480] had held, mainly following the decision in **Subrahmaniyan's case** [Subrahmaniyan v. State of Kerala (2010(2) KLT 470] which is referred to therein, that the Assistant Excise Inspector was not empowered under the Act as it stood then to perform the duties under Sections 40 to 53 of the Act and accordingly, the appeal was allowed. In the present case, it is beyond dispute that PW1 was working as Assistant Excise Inspector at the time of the alleged detection which was allegedly taken place on 25.6.2002. If that be so, the appellant/complainant is entitled to get an acquittal in terms of the judgment cited supra.

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In the result, this appeal is allowed setting aside the judgment dated 25.11.2006 in S.C.No.255 of 2004 of the court of Additional District and Sessions Judge (Fast Track (ADHOC II), Kozhikode and accordingly, the appellant is acquitted of all the charges levelled against him and he is set at liberty and the bail bond, if any, executed by him will stand cancelled.

This appeal is allowed as above.

**V.K.MOHANAN,  
Judge**

MBS/



**Crl.A.No.100 of 2007**

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**V.K.MOHANAN, J.**

**CRL.A.No. 434 OF 2003**

**JUDGMENT**

**Crl.A.No.100 of 2007**

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Dated:11.11.2011