

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 6TH DAY OF NOVEMBER 2015/15TH KARTHIKA, 1937

CRL.A.No.7 of 2006

AGAINST THE JUDGMENT IN SC 619/2003 of ADDL.DISTRICT & SESSIONS
COURT FAST TRACK (ADHOC-I), KOZHIKODE DATED 29-11-2005

APPELLANT/1ST ACCUSED:

PURUSHOTHAMAN, S/O.RAMUNNI NAIR,
AGED 26 YEARS, RESIDING AT POOVANMALA, ETTEKRA COLONY,
KEDAVOOR AMSOM, CHAMAL DESOM, KOZHIKODE TALUK.

BY ADV. SRI.SUNNY MATHEW

RESPONDENT/COMPLAINANT:

STATE OF KERALA, THORUGH THE
SUB INSPECTOR OF POLICE, THAMARASSERY POLICE STATION,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY SMT.S.HYMA, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
06-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.7 OF 2006

Dated this the 6th day of November, 2015.

J U D G M E N T

Two persons were prosecuted for the offence punishable under Section 55(a) of Abkari Act. This appeal is by the 1st accused who was found guilty of the offence alleged against him. He was therefore convicted and sentenced to suffer rigorous imprisonment for two years and to pay a fine of Rs.1 lakh with default clause of simple imprisonment for six months. Set off as per law is allowed.

2. The prosecution case is that on 25.12.2001, while PW1, Sub Inspector of Police, Thamarassery along with team of officers were patrolling as usual, at about 17.45 hours, when they reached near KSEB sub station, they saw two persons going along the road. Seeing the police jeep, they became jittery and tried to conceal themselves. Feeling suspicious, they were intercepted and their body was searched. From the pocket of the pant of the 2nd accused namely, Sajeendran, 5 plastic covers each

containing 125 ml of liquid was seized. From the 1st accused, 4 plastic packets of same quantity was seized. PW1 examined all the packets and was convinced that the liquid contained in the packets was arrack. After preparing Exts.P1 and P2 arrest memos, the accused persons were arrested. The inspection memos are Exts.P3 and P4. The contraband was taken in three bottles having a capacity of 375 ml each and was sealed. Two of them were taken as samples and they were sealed and labels were affixed as usual containing the signature of the accused, witnesses and PW1. Ext.P5 is the seizure mahazar. PW1 returned to the Station and registered crime as per Ext.P6 First Information Report. He prepared Ext.P7 property list, Ext.P8 forwarding note and obtained Ext.P9 chemical analysis report.

3. PW5 conducted investigation of the case. He went to the place of occurrence and prepared Ext.P11 scene mahazar. He recorded the statement of witnesses and completed the investigation. The Sub Inspector of Police, Thamarassery laid charge before court.

4. The court before which final report was laid took

cognizance of the offence and on finding that the offence is exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Kozhikode under Section 209 Cr.P.C after following necessary procedures. The said court made over the case to Additional District and Sessions Court Fast Track (Adhoc-I), Kozhikode for trial and disposal. The latter court, on receipt of records and on appearance of accused, framed charge for the offence under Section 55(a) of Abkari Act. To the charge, accused pleaded not guilty and claimed to be tried.

5. The prosecution, therefore, had PWs 1 to 5 examined and Exts.P1 to P11 marked. M.O.s 1 and 2 were got identified and marked.

6. After the close of the prosecution evidence, accused were questioned under Section 313 Cr.P.C. They denied all the incriminating circumstances brought out in evidence against them and maintained that they were innocent.

7. Finding that the accused could not be acquitted under Section 232 Cr.P.C, they were asked to enter on their defence. They chose to adduce no evidence.

8. Relying on the evidence of PWs 1 to 3 and also the contemporaneous document prepared by PW1 namely, Ext.P5 seizure mahazar, court below came to the conclusion that the offence has been clearly made out. Conviction and sentence as already mentioned followed. As already stated, this appeal is filed by the 1st accused.

9. Learned counsel appearing for the appellant raised only two points for consideration. It is pointed out that there is no mention anywhere in the records or in the evidence of PWs 1 and 2 to the effect that the packets seized from both the persons were identical in nature or similar in nature. If that be so, it is pointed out that separate samples ought to have been drawn and mixing of packets seized from two of the accused cannot be justified in law. For the above proposition, learned counsel relied on the decision in **Chandran vs. State of Kerala** (2008 (2) KLT 513). Learned counsel then emphasised the fact that even though the incident took place on 25.12.2001, articles were produced only on 26.12.2001. There is one day delay in producing the material before court and there is no explanation

offered for the delay. That is also fatal. It is pointed out that these two significant aspects have been omitted to be noticed by the court below and that has resulted in a wrong conclusion being entered into.

10. Learned Public Prosecutor, on the other hand, pointed out that all the proceedings that are required to be followed have been followed and it is a case where the independent witness supports the prosecution case. There is nothing to show that PWs 1 and 2 had any reason to falsely implicate the accused and so also the contemporaneous document supports the prosecution case. The court below has analysed the evidence in considerable detail and has come to the conclusion that the offence has been made out. Learned Public Prosecutor pointed out that there are no grounds made out to interfere with the findings of the court below.

11. In the light of the fact that the learned counsel for the appellant relies heavily on the decision in **Chandran vs. State of Kerala** (2008 (2) KLT 513) in support of the proposition that sample is defective, it is necessary to examine the case in detail.

In the said decision, the decision in **Krishnankutty vs. State of Kerala** (2005 (3) KLT 568) was called in question. In the said case, liquor seized from the bus allegedly in possession of the appellant was 10 bottles of 180 ml of Indian Made Foreign Liquor and 3 bottles of 375 ml of the same stuff. The total quantity seized is 2.925 liters. Of course, during the relevant time, a person could possess a maximum quantity of 1.5 liters without any permit. It was contended that the accused was not in possession of excess quantity. In the said case, prosecution has miserably failed to establish the case against the accused. Going by the samples taken from the bottles, quantity is less than the permissible limit. Therefore, it is contended that the accused is entitled to acquittal. Following the decisions in **Vijendrajit Ayodhya Prasad Goel vs. State of Bombay** (AIR 1953 SC 247) and in **Gaunter Edwin Kircher vs. State of Goa** (AIR 1993 SC 1456), this Court had occasion to hold that once it is seen or mentioned that all the packets or all the bottles are similar in nature and kept alive, it will be sufficient to take samples from one of the bottles or the packets as the case may be. The

Division Bench of this Court in the above decision deferred from the view taken by the court in the said case that in all cases samples of each bottles will have to be taken. It was held as follows:

“.....Similarly if large number of similarly labelled bottles purported to contain same type of article are seized, chemical examination can be done by taking one bottle or certain number of bottles selected at random. There cannot be any sweeping generalization. Each case must be judged on its own facts by taking into account admissible evidence”.

12. In the case on hand, neither PW1 nor PW2, detecting officer and the officer accompanied him, say that the packets seized from the possession of both the accused were identical in nature or similar in nature. It is disappointing to note that seizure mahazar also does not mention the said fact. Unless there is a plea made by the prosecution that all the packets were similar in nature and contain similar contents, applying the decisions cited above, it could be seen that the sampling done is not proper. Unless the prosecution has a case that the articles seized were similar in nature, the detecting officer could not

escape from taking two different samples. Obviously, in the present case, there is nothing in the records to show that packets seized from both the persons are identical in nature and sample taken from one of them is sufficient. What the detecting officer did was he mixed contents of both the packets together and had taken samples from them. That is permissible only in cases where the packets seized are identical and there is an averment to that effect. It will be useful to refer to the statement made by PW1 in this regard.

“9 packetലെ ചാരായം 3 കുപ്പികളിലാക്കി എടുത്തു. ഇന്ന പ്രതിയിൽ നിന്ന് പിടിച്ചതാണ് ഇന്ന കുപ്പിയിൽ ഒഴിച്ചത് എന്ന് പ്രത്യേകം പറയാൻ പറ്റിയിട്ടില്ല”.

13. Added to the above statement is the fact that there is no case for the prosecution that all the packets were similar in nature or in the same stuff. In the absence of such an averment, it would have been necessary for the detecting officer to take two separate samples. Since the accused is entitled to succeed on this ground, it is not necessary to go into the question of delay. Even otherwise there is not much substance in the contention based on delay.

For the above reasons, this appeal is allowed. The conviction and sentence passed by the court below are set aside. It is held that the prosecution has not succeeded in establishing the case against the accused. The accused stands acquitted of the charge levelled against him. His bail bond shall stand cancelled and he is set at liberty.

Sd/-

**P.BHAVADASAN
JUDGE**

smp

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P.A to Judge