

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 9TH DAY OF SEPTEMBER 2015/18TH BHADRA, 1937

CRL.A.No. 47 of 2006 (B)

AGAINST THE JUDGMENT IN S.C. 611/2003 of ADDL.DISTRICT AND SESSIONS
COURT FAST TRACK (ADHOC-I), KOZHIKODE.

APPELLANT(S)/ACCUSED.:

GOPALAN, S/O. KELAPPAN,
KOYILOTH, ULLIYERI AMSOM, NARATH DESOM,
KOYILANDY TALUK,
KOZHIKODE DISTRICT.

BY ADV. SRI.SANTHARAM.P

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA, REP. BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY ADV. PUBLIC PROSECUTOR SMT. S. HYMA.

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

P. BHAVADASAN, J.

Crl.Appeal. No. 47 of 2006

Dated this the 9th day of September, 2015.

JUDGMENT

The accused was prosecuted for the offences punishable under Sections 8(1) and 8(2) of the Kerala Abkari Act. He was found guilty of the offences and therefore convicted and sentenced to undergo rigorous imprisonment for two years and to pay fine of Rs.1,00,000/–, in default, to undergo simple imprisonment for six months. Set off as per law was allowed.

2. P.W.1, the Preventive Officer attached to the Excise Circle Office, Perambra while on patrol duty along with another officer happened to see the accused coming from the opposite direction carrying a 10 litre can in his hand. Feeling suspicious, he was intercepted and in the presence of witnesses the can was examined. It was found to contain 5 litres of contraband article. After smelling and tasting the

liquid, it was found as arrack. The accused was arrested and Ext.P1 is the arrest memo. P.W.1 says that sample was taken in a 180 ml. bottle and the sample bottle and the residue bottle were sealed. He says that he, the accused and the witnesses put their signature on the label. Thereafter he claims to have prepared Ext.P2 mahazar. He, P.W.3 and the Excise Inspector of Balussery produced the articles and the accused before Balussery Excise Range. P.W.3 registered crime as per Ext.P3 and prepared Ext.P4 property list. Ext.P5 is the forwarding note. He procured Ext.P6 chemical analysis report. P.W.5 took over investigation, recorded the statements of witnesses and laid charge before court.

3. JFCM Court, Quilandy, before whom final report was laid took cognizance of the offences. Finding that the offences are exclusively triable by a court of Sessions, the said court committed the case to Sessions Court, Koyilandy. The said court made over the case to Additional District and Sessions Court, Fast Track (Adhoc-I), Kozhikode for trial and disposal.

4. The latter court, on receipt of records and on appearance of the accused framed charge for the offences punishable under Sections 8(1) and 8(2) of the Abkari Act. To the charge, the accused pleaded not guilty and claimed to be tried. The prosecution therefore had P.Ws.1 to 5 examined and had Exts.P1 to P6 marked. M.O. 1 was identified and marked. After the close of the prosecution evidence, the accused was questioned under Section 313 Cr.P.C. He denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent. Finding that the accused could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. He chose to adduce no evidence.

5. The trial court mainly relying on the evidence of P.Ws.1 and 2, found that the accused had committed the offences and accordingly found him guilty and conviction and sentence as already mentioned followed. The said conviction and sentence are assailed in this appeal.

6. Assailing the conviction and sentence, learned counsel for the appellant contended that P.W.1 was incompetent to detect the crime as he had no territorial jurisdiction. He was attached to Perambra Excise Circle Office and the incident took place at Balussery. This vitiates the whole proceedings and therefore the accused is to be acquitted. In support of the said contention, learned counsel relied on the decision reported in Sasidharan v. State of Kerala (2012 (2) K.L.T. 392), Hamsa Koya v. State of Kerala (2015(2) K.H.C. 206) and unreported decisions in Crl.R.P. 1156 of 2003 and 1509 of 2005. Further, it is contended that P.W.1's evidence show that the signatures on the labels are tampered and that would show that there is no authenticity for the article. Learned counsel then went on to point out that going by the provisions of Excise Manual, two samples had to be taken and that is a mandatory provision. Going by the evidence of P.W.1 only one sample had been taken and that is illegal. On the above grounds, learned counsel pleads for an acquittal.

7. First of the contentions is devoid of merits. True, P.W.1 stated that he is attached to Perambra Excise Circle Office. He had detected the offence. The crime was registered at Balussery Excise Range office. But surprisingly enough no question was put to P.W.1 as to why he was doing patrol duty at Balussery Excise Range when he was confined to Perambra Excise Range. P.W.5 is the investigating officer and no question was put to him also regarding the same. Therefore, merely because that P.W.1 was attached to Perambra Excise Range Office, it does not lead to the automatic conclusion that he had no territorial jurisdiction over the place from where the crime was detected.

8. P.Ws. 1 and 2, the two officers who are on patrol duty on the date of incident happened to see the accused with a can in his hand. They say that they had intercepted the accused and seized a can having capacity of 10 litres and on examination it was found to contain 5 litres of illicit arrack. Both of them gave a consistent version. P.W.1 says about the

labeling and taking of samples.

9. P.W.3 is the person who had registered the crime when the articles and the accused were produced before Baluserry Excise Range. P.W.5 conducted the investigation. Ext.P2 is the contemporaneous document which contains all the essential details. It is in tune with the evidence given by P.Ws. 1 and 2. Therefore, there is no reason to believe that the accused was not guilty.

10. However, there is one glaring aspect in this case. As per the provisions of the Abkari Act and Excise Manual, the officer concerned is bound to take minimum of two samples. This is a mandatory provision. In the case on hand, only a single sample had been taken and there is also controversy regarding the seal affixed on the sample.

11. The insistence for taking two samples has a purpose to serve. If the accused feels that the first sample sent for examination was not sufficient or that there is some defect, of course he can seek the court to sent the second sample for examination. That is a safeguard given to the

accused which cannot be denied at all by taking only one sample. It is clear that P.W.1 had taken only one sample. It has been held by this Court that violation of such provision is fatal.

For the above reason, this appeal is allowed, the conviction and sentence passed by the trial court are set aside and the accused shall stand acquitted of the charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

P. BHAVADASAN,
JUDGE

sb.