

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 2ND DAY OF DECEMBER 2015/11TH AGRAHAYANA, 1937

CRL.A.No.103 of 2006

AGAINST THE JUDGMENT IN SC 238/2000 of ADDL. DISTRICT AND
SESSIONS COURT (ADHOC) -I, KOLLAM DATED 22-12-2005

APPELLANT/ACCUSED:

BALACHANDRAN, S/O. KARUNAKARAN,
KARUMBIL VEEDU, ITHOTTUVA MURI, EAST KALLADA,
KOLLAM.

BY ADVS.SRI.S.SUDHEESHKAR
SRI.K.SIJU

RESPONDENT/COMPLAINANT:

STATE OF KERALA REPRESENTED BY THE
SUB INSEPCTOR OF POLICE, KALLADA POLICE STATION,
THROUGH PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY SMT. S. HYMA, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
02-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.103 OF 2006

Dated this the 2nd day of December, 2015.

J U D G M E N T

The accused was prosecuted for the offence punishable under Sections 55(a), (h) and (i) of Abkari Act. He was found guilty of the offence under Section 55(i) of Abkari Act and 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 one year. Set off as per law was allowed.

2. The incident in this case took place on 02.09.1998. PW3, Sub Inspector of Police of Kallada Police Station, along with other officers went for patrol duty on that day also and when they reached Koduvila Junction, they got reliable information that a person is engaged in sale of foreign liquor on the road side at Paricheri. When the police team reached the spot, they saw a person holding a big shopper and a glass. Seeing the police

officers, he tried to escape. He was effectively intercepted and the big shopper was seized from his possession. On examination, the big shopper was found to contain Indian Made Foreign Liquor in 10 bottles of 375 ml each, 2 bottles of 750ml each and 550 ml of 750 ml capacity. The cap of the bottle containing 550 ml liquid was seen opened. By taste and smell, the liquid was identified as foreign liquor. The accused was arrested and the money with him was seized. All the bottles were sealed in the presence of witnesses and the mahazar prepared in that regard is Ext.P1. He returned to the station and registered Crime No.145/98 as per Ext.P2 First Information Report. He had the accused produced before court so also the property seized from the possession of accused. Ext.P3 is the property list prepared by him. PW3 claims to have sent a forwarding note to the court calling upon the court to sent the sample for chemical analysis. He obtained chemical analysis report as per Ext.P4. He recorded the statement of witnesses, completed the investigation and laid charge before court.

3. The court before which final report was laid took

cognizance of the offence and finding that the offence is exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Kollam. The said court made over the case to Additional District and Sessions Court (Adhoc) -I, Kollam for trial and disposal. The latter court, on receipt of records and on appearance of accused, framed charge for the offence under Sections 55(a), (h) and (i) of Abkari Act. The accused pleaded not guilty to the charge and claimed to be tried.

4. The prosecution therefore had PWs 1 to 3 examined and Exts.P1 to P4 marked. M.O.s I to IV were identified and marked.

5. After the close of the prosecution evidence, 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.

6. Finding that the accused could not be acquitted under Section 232 Cr.P.C, he was asked to enter on his defence. He examined DWs 1 and 2.

7. The court below found that the evidence of PWs 2 and 3 corroborate each other and their evidence taken along with the

contents of Ext.P1 mahazar are sufficient to show that the accused was dealing with contraband article. Accordingly, convicted and sentenced the accused as already mentioned.

8. Assailing the conviction and sentence, learned counsel appearing for the appellant contended that there is no evidence as to who had taken sample, from where it was taken and when it was taken and therefore, the prosecution should fail. It is also pointed out that the forwarding note has not been produced before court. Therefore, there is no guarantee that the sample which reached the laboratory is the sample taken from the contraband seized from the possession of accused. For the above proposition, learned counsel relied on the decision in **Majeedkutty vs. Excise Inspector** (2015 (1) KLT 624). Accordingly, it is contended that the conviction and sentence cannot stand.

9. Learned Public Prosecutor, on the other hand, contended that there is no reason to disbelieve PWs 2 and 3 and the contemporaneous document Ext.P1 fortifies their evidence. It could not be said that there was any fabrication. It is pointed out

that the evidence of PWs 2 and 3 are sufficient to come to the conclusion that the contraband was seized from the possession of accused.

10. The evidence regarding detection and sealing of the bottles seized from the possession of the accused is spoken to by PWs 2 and 3. It is not disputed that PW2 was accompanying PW3 at the relevant time. Both of them say about seizure of articles, arrest of accused etc. They further go on to say that the labels contained on the bottles seized from the possession of accused had the signatures of witnesses and PW3. If one is to simply accept their evidence, it could be said that there was proper detection. But that is not enough. It is by now well settled that it has to be established by evidence that the article is a contraband article.

11. It is here that the question as to who had taken sample assumes importance. Admittedly, going by the evidence of PWs 2 and 3 and the contents of Ext.P1, there is nothing to indicate that any sample was taken by PW3 at the spot. PW3 has also no case that after he returned to the station, he had taken

sample from any one of the bottles. In fact, his evidence is to the effect that all the bottles were sealed at the time of detection itself. The only possibility therefore is the sample being taken by an employee deputed by the court. In such cases, it is well settled that the said person has to be examined to ensure that proper sampling has been done, and the relevant documents need to be produced. Further, no forwarding note is seen produced before the court below containing the specimen seal said to have been affixed by the detecting officer on the bottles. Further the evidence of PW3 shows that sample was taken from court. It means that an employee of the court has taken sample. As is pointed out by the learned counsel for the appellant, it is elementary that that person has to be examined and relevant document has to be produced. That has not been done. It is therefore difficult to uphold the findings of the court below in the light of the above discussion.

In the result, this appeal is allowed. The conviction and sentence passed by the court below are set aside and it is held that the accused is not guilty of the offence. He stands acquitted

of the charges 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.