

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 13TH DAY OF NOVEMBER 2015/22ND KARTHIKA, 1937

CRL.A.No. 125 of 2006 ()

**AGAINST THE JUDGMENT IN SC 656/2000 of ADDITIONAL SESSIONS COURT FAST
TRACK (ADHOC)-IV, THIRUVANANTHAPURAM DATED 13-12-2005**

IN CP 22/2000 OF JUDICIAL FIRST CLASS MAGISTRATE - II, ATTINGAL

APPELLANT(S)/ACCUSED::

**SAMBAN ALIAS SASI, S/O. SREEDHARAN,
KANNATHUKATTIL VEEDU, PULLAYIL, KODUVAZHOO VILLAGE
CHIRAYINKEEZHU TALUK, THIRUVANANTHAPURAM DISTRICT.**

BY ADV. SRI.LIJU. M.P

RESPONDENT(S)/COMPLAINANT::

**STATE OF KERALA, REP. BY THE
EXCISE INSPECTOR, CHIRAYINKEEZHU RANGE
THIRUVANANTHAPURAM, REP. BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.**

BY PUBLIC PROSECUTOR SMT. S. HYMA

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 13-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 125 of 2006

Dated this the 13th day of November, 2015

J U D G M E N T

The accused was prosecuted for the offence punishable under Section 8(1) & 8(2) of the Abkari Act. After trial, he was found guilty and he was convicted and sentenced to suffer rigorous imprisonment for two years and to pay a fine of ₹1 lakh with a default clause of three months rigorous imprisonment .

2. The incident in this case is said to have taken place on 16.12.1998. PW3 was then functioning as the Preventive Officer attached to Excise Range Office, Chirayinkeezh. He on that day as usual, along with PW2 and others set out on patrol duty. Whey they reached in front of Poikakada Public Market, they happened to see a person coming along the road with a bag. When he saw the excise party, he tried to sneak out of the way. Feeling suspicious, he was intercepted and the can was seized. The can had a

capacity of 5 litres and it contained some liquid. By taste and smell, it was identified as arrack. Arrest memo was prepared and the accused was arrested. The can was sealed and labelled and the label contained the signatures of the accused, PW3 and the witnesses. Ext.P1 mahazar was prepared on the spot and then they returned to the Station. As PW3 had the charge of the Excise Inspector, he prepared Ext.P5 occurrence report and registered Crime No. 66/1998 for the offence punishable under Section 8(1) and 8(2) of the Abkari Act. He prepared Ext.P6 property list. Investigation was conducted by PW4, who recorded statement of witnesses and he obtained the Chemical Analysis Report namely, Ext.P7, completed investigation and laid charge before court.

3. The court before which the final report was laid, took cognizance of the offence and finding the offence to be exclusively triable by a Court of Sessions, committed the case to Sessions Court, Thiruvananthapuram under Section

209 of Cr.P.C. after following the necessary procedures. The said court made over the case to Additional Sessions Court, Fast Track (Ad hoc)-IV, Thiruvananthapuram, for trial and disposal.

4. The latter court, on receipt of records and appearance of the accused before the said court, framed charges for the offence punishable under Section 8(1) & 8(2) of the Abkari Act.

5. To the charge the accused pleaded not guilty and claimed to be tried. The prosecution therefore had PWs 1 to 5 examined and had Exts.P1 to P7 marked. MO1 was got identified and marked. From the defence side, Ext.D1 was marked.

6. After the close of 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. He also added that a person by name Shibu @ Mohan with

the influence of the Police and the Excise Official had implicated him in a false case.

7. Finding that he could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. He chose to adduce no evidence.

8. It would appear that the court below greatly impressed by the evidence of PWs 2 and 3 and also the mahazar prepared by the Officer concerned, thought it sufficient to come to a conclusion that the offence had been made out. Conviction and sentence as already mentioned followed.

9. Assailing the conviction and sentence, the learned counsel for the appellant contended that this appeal will have to succeed on a very short ground. According to the learned counsel, there is no evidence regarding the sampling alleged to have been done in the case as contended by the prosecution. It is evident from a reading of the testimony PWs 2 and 3 that sample was not taken by

either PW3 or PW2 and the entire articles seized were produced before court. The only conclusion that can be drawn is the sample was taken from the court. There is no evidence regarding the same. It is also contended by the learned counsel for the appellant that there is no evidence of the specimen seal, if at all any used, in sealing the sample and that too is fatal to the prosecution. The learned counsel went on to point out that there is no guarantee that the sample sent for chemical analysis is the sample taken from the contraband article seized from the possession of the accused. The learned counsel relied on the decisions reported in **Joseph v. State of Kerala** (2009 (4) KHC 537), **Majeedkutty v. Excise Inspector** (2015 (1) KLT 624) and **Krishnan v. State** (2015 (2) KLT SN 8).

10. The learned Public Prosecutor attempting to support the conviction and sentence pointed out that the evidence of PWs 2 and 3 are sufficient in law to warrant a conclusion that the offence had been made out. Ext.P1

further corroborates the evidence of PWs 2 and 3. There is no reason to disbelieve PWs 2 and 3 in this case. Even there is any defect in the sampling, it will not go to the root of the matter and therefore the conviction has only to stand.

11. It is by now well settled that merely because some article is seized from the possession of the accused, it need not lead to the conclusion that it is arrack and that the accused should be found to have been in possession of contraband article. The Chemical Analysis Report forms a vital part of the proceedings and it is well settled that the sampling done during the course of investigation or in the court has a material bearing on the issue involved in the proceedings.

12. Of course, the evidence of PWs 2 and 3 are uniform and consistent with regard to the location from where the seizure was made and also the person from whom the seizure was made. Their evidence is also uniform with regard to the fact that no sample was taken by either

PW3 or PW2 from the place of incident. It is also evident from their evidence that the entire contraband articles seized from the possession of the accused were produced before court. The endorsement by the court as evidenced by Ext.P6 shows that the court directed return of articles after taking sample.

13. There ends the matter. There is no evidence to show that whether any sample was taken at all and if any sample was taken, who had taken the sample, when it was taken and how it was taken. This Court had occasion to consider such situations and this Court has laid down the principle that in such cases, it is inevitable that the Thondi Clerk, who was responsible for taking the sample, must be examined to prove that sample was properly taken. In the case on hand, there is no examination of the Thondi Clerk at all and that it is not known as to who had taken the sample.

14. Further, to add to the agony of the prosecution, there is no evidence at all regarding the seal used for

sealing the sample. There is no forwarding note produced by the prosecution and there is no specimen seal available in court to ensure that the sample sent for chemical analysis is the sample taken from the contraband article seized from the possession of the accused. In the absence of this vital evidence, it may not be prudent on the part of the court to find the accused guilty.

15. Even assuming PWs 2 and 3 evidence need not be doubted for other reasons, this Court is unable to uphold the conviction and sentence passed by the court below.

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

Sd/-
P.BHAVADASAN
JUDGE

ds

//True copy//

P.A. to Judge