

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 7TH DAY OF OCTOBER 2015/15TH ASWINA, 1937

CRL.A.No. 213 of 2006 ()

**AGAINST THE JUDGMENT IN SC 421/2001 of ADDITIONAL SESSIONS COURT FOR THE
TRIAL OF ABKARI ACT CASES, NEYYATTINKARA DATED 05-01-2006**

IN CP 132/2000 OF JUDICIAL FIRST CLASS MAGISTRATE -III, NEYYATTINKARA

APPELLANT(S)/ACCUSED::

**GEORGE, S/O. MANAS,
KALLUVILA MUGALPUTHEN VEEDU, CHEMBOORA DESOM
KEEZHAROOR VILLAGE, NEYYATTINKARA TALUK.**

BY ADV. SRI.R.T.PRADEEP

RESPONDENT(S)/COMPLAINANT::

**THE STATE OF KERALA,
REP. BY THE DIRECTOR GENERAL OF PROSECUTION
HIGH COURT OF KERALA, ERNAKULAM.**

BY PUBLIC PROSECUTOR SMT. S. HYMA

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 07-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 213 of 2006

Dated this the 07th day of October, 2015

J U D G M E N T

The accused was prosecuted for the offence punishable under Section 58 of the Abkari Act. He was found guilty and therefore, he was convicted and sentenced to suffer rigorous imprisonment for one year 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 occurred on 20.11.1997. On that day, PWs 2 and 4 headed by PW3 were on patrol duty and they found the accused coming in the opposite side carrying a can with him. Feeling suspicious, he was intercepted and the can was examined. The can had a capacity of 2½ litres and it contained two litres of liquid. By taste and smell, they realized that it was arrack. The accused was arrested and the article seized was sealed and labelled in the place of occurrence. Ext.P1 mahazar was prepared at the spot. They returned to the

Police Station and registered crime as per Ext.P2. Ext.P3 is the arrest memo. The property and the accused were produced before court on the same day. The property list was marked as Ext.P5. The investigation was taken over by PW4, who recorded statement of witnesses and laid final report before court. It is seen from the records that sample was taken from the can and sent for chemical analysis. The report so obtained is marked as Ext.P6.

3. The court before which the final report was laid, took cognizance of the offence, but finding the offence to be exclusively triable by a Court of Sessions, committed the case to Sessions Court, Thiruvananthapuram under Section 209 Cr.P.C.. The said court made over the case to Additional Sessions Court, Neyyattinkara for trial and disposal.

4. The latter court on receipt of records and on appearance of the accused before it, framed charges for the offence punishable under Section 58 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 6 examined and had Exts.P1 to P7 marked. MO1 was got identified and 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.

7. Finding that he could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. He examined DW1.

8. Presumably based on the evidence of PWs 2 to 4 and also the seizure mahazar, the court below came to the conclusion that the offence has been established beyond reasonable doubt and thus, the conviction and sentence as already mentioned followed.

9. Assailing the conviction and sentence, the learned counsel appearing for the appellant contended that by no

stretch of imagination, Section 58 can be attracted to the facts of the case, there is no allegation which are necessary to attract the said provision. That requires the person to possess with the knowledge that the article has been unlawfully manufactured, which allegation is not either in any of the records or in the charge framed by the court. Therefore, the conviction under Section 58 cannot stand. The learned counsel then pointed out that there is considerable ambiguity regarding the sample taken and sent for chemical analysis. PWs 2 to 4 the officers, who had detected the offence and who had seized the articles, do not say anything about the preparation of sample. From the evidence of PW6, the Thondi Clerk of the Magistrate Court concerned revealed that it is he who had taken the sample. But he does not say about having sealed the sample, had labelled the same containing the signature of the accused etc.. He simply says that he had taken the sample as per the orders of the learned Magistrate. He would say that the

sample must most probably have been taken on the day on which the article was produced. Going by the forwarding note, the sample seems to have been taken long after the detection of the offence. The property list produced before the court below does not indicate that there was any sample taken at the time of detection. It is worthy in this respect to refer to the evidence of PW6 which would show that there was no proper sampling. From these infirmities, according to the learned counsel, the conviction and sentence cannot stand.

10. The learned Public Prosecutor on the other hand contended that even assuming the offence under Section 58 of the Abkari Act is not attracted, the Act would fall within the ambit of Section 63 and the appellant cannot have saved from the ambit of Section 63. As regards sampling, it was contended that the evidence of PW6 is sufficient to show that sample was properly taken and sent for chemical analysis. The learned Public Prosecutor contended that

these aspects have been considered in detail by the court below which found the evidence to be acceptable and convincing enough to hold the accused guilty. Unless the appreciation is shown to be perverse, interference may not be justified.

11. True, as rightly pointed out by the learned Public Prosecutor, if the evidence of PWs 2 to 4 and the evidence regarding the sampling is convincing enough, then there is no reason as to why the accused should not be held guilty. PWs 2 to 4, who are the excise officers, would speak about only the detection. They say that while they were on patrol duty, they happened to come across the accused standing with a can and they seized the can and examined the contents thereof. All the three of them say that on examination, the liquid found in the can was arrack. They also say that the can was seized and the can and the accused were taken to the Police Station and crime was registered.

12. It is seen from the records that the property was produced on the very same day itself before court. But conspicuously, there is nothing show that any sample has been taken. PWs 2 to 4 also do not have a case that they had taken any samples from the contraband article either from the place of occurrence or from the Police Station.

13. It is in this context, the evidence of PW6 assumes importance. PW6 is the Thondi Clerk who claimed that sample was taken by him. In his chief examination, he does not say anything about the sealing and labelling of the sample. In cross examination, he conceded that no sample seal was provided to identify the articles seized by PW4. He also conceded that the concerned register does not indicate as to when the sample was taken. It cannot also be discerned from the records as to who was entrusted with the samples. He accepted the suggestions that since the specimen seal was not produced before court, he is not in a position to say that whether the articles produced before

court were seized from the accused.

14. There is nothing in the evidence of PW6 to show that there was proper sampling of the article seized. It is also stated that in Ext.P7 the property register, there is no endorsement regarding the articles produced or verified.

15. Going by the evidence of PW6, it is extremely difficult to come to the conclusion that there is proper sample taken for chemical analysis. In the absence of any report from chemical analysis, it will be hazardous to venture a finding of guilt of the accused.

16. Apart from the above fact, the learned counsel for the appellant is fully justified in his submission that by no stretch of imagination Section 58 can be attracted to the facts of the case. The necessary ingredients to attract the said provision was considered in the decision reported in **Josekutty v. State of Kerala** (2013 (1) KHC 241) wherein it was held as follows:

“In the charge framed against the petitioner, there is no allegation that petitioner has been in possession of the liquor with the knowledge that it was illegally manufactured. Question is whether in the absence of a positive allegation that petitioner was possessing illicit liquor knowing that it was unlawfully manufactured, an offence under Section 58 is attracted. Though Section 64 of the Act provides for the presumption to be drawn, before Section 58 along with Sections 55B, 56A, 57, 58A and 58B were inserted, by the Act 16 of 1997 w.e.f. 03/06/1997, presumption cannot be drawn in respect of the offence under Section 58m by re-course to Section 64 of the Act. Therefore, fact that an accused has been in possession of the illicit liquor by itself is not sufficient. Possession must be knowing that it has been unlawfully manufactured. That fact is to be established by the prosecution. If there is no allegation in the charge and no evidence was adduced with respect to the factum of possession “with the knowledge that it has been unlawfully manufactured”, Section 58 cannot be attracted. Division Bench in Surendran's case (supra) considered this aspect, in

paragraph 12 and held. The final report submitted shows that there is no allegation that the petitioner was in possession of the illicit liquor with the knowledge that it is illicit liquor. So also, none of the prosecution witnesses has a case that petitioner had the knowledge that he was holding a can containing illicit liquor. In such circumstances, possession of liquor with the knowledge that it is illicit liquor, cannot be assumed. Hence, in the absence of evidence, petitioner can only be convicted for the offence under Section 63 of the Kerala Abkari Act. Section 63 as it then stood, provides only the sentence of fine.”

17. However, in the light of the fact that no proper sampling has been done, it could not be said that the articles seized from the possession of the accused is contraband article.

For the above reasons, this Court is unable to uphold the conviction and sentence passed by the court below. This appeal is allowed. The conviction and sentence are set aside and the accused is held not guilty of the offence

alleged against him. He is acquitted of all charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

Sd/-
P.BHAVADASAN
JUDGE

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P.A. to Judge