

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 9TH DAY OF DECEMBER 2015/18TH AGRAHAYANA, 1937

CRL.A.No. 273 of 2006 ()

**AGAINST THE JUDGMENT IN SC 465/2000 of ADDITIONAL DISTRICT AND SESSIONS
COURT (ADHOC)-I, KOLLAM**

IN CP 16/2000 OF JUDICIAL FIRST CLASS MAGISTRATE - I, KARUNAGAPPALLY

APPELLANT(S)/ACCUSED.:

**ASOKAN, S/O.SADANANDAN, KOCHUPURAKKAL
VEEDU, KALLELIBHAGAM, KARUNAGAPPALLY.**

**BY ADVS.SRI.A.N.RAJAN BABU
SMT.K.SUNITHA VINOD**

RESPONDENT(S)/COMPLAINANT.:

**STATE OF KERALA, REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.**

BY PUBLIC PROSECUTOR SMT. S. HYMA

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 09-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

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P.BHAVADASAN, J.

Crl.A. No. 273 of 2006

Dated this the 09th day of December, 2015

J U D G M E N T

The accused was prosecuted for the offence punishable under Section 55(a) of the Abkari Act. He was found guilty. He was therefore convicted and sentenced to suffer rigorous imprisonment for four years and to pay a fine of ₹1 lakh.

2. The incident which gave rise to the case occurred on 14.03.1998. On that day PWs 1 and 5, both Preventive Officers attached to Excise Range Office, Karunagappally, had gone on routine patrol duty. when they reached in front of the Ratna Travels run by Adv. Babu, they happened to see the accused coming from the bye-lane near the said house holding a box. On seeing the excise officials, he tried to run away. He was intercepted and cardboard box was seized. It was found to contain a can having a capacity of 10 litres. It also contained 14 bottles each having a capacity of 375ml filled with some liquid. On examination of the liquid by taste

and smell, it was revealed that it was arrack. The can was full of arrack. The bottles contained about 5.25 litres of Indian Made Foreign Liquor. The can and the bottles were separately sealed as per Ext.P1 mahazar. Ext.P2 is the arrest memo. It is stated that the wife of the accused was informed about the arrest. The articles so seized along with the accused was handed over to PW4, the Station House Officer. PW4 would say that on the date of incident i.e. On 14.03.1998, the accused, the contraband article and the documents were produced before him by PW1. On that basis, Crime No. 28/1998 was registered as per Ext.P3 occurrence report. Ext.P4 property list was prepared by him and he made a requisition to the court to send the two samples of 150ml each in two bottles for chemical examination. He also preferred a forwarding note. PW4 says that as per the requisition made, samples were taken from the court and sent it for chemical analysis and Ext.P5 is the report. Further investigation was conducted by his

successor-in-office, namely, PW6. PW6 says that he recorded statements of witnesses, 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, Kollam under Section 209 of Cr.P.C. after following the necessary procedures. The said court made over the case to Additional Sessions Court (Adhoc)-I, Kollam, for trial and disposal.

4. The latter court, on receipt of records and appearance of the accused before the said court, framed charge for the offence punishable under Section 55(a) 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 P5 marked. MOs 1 to 3 were 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 chose to adduce no evidence.

8. Based on the evidence of PWs 1 and 5 and also the contemporaneous document Ext.P1 and the prompt production of the articles and the accused before court, the court below felt that the prosecution has succeeded in establishing its case against the accused beyond reasonable doubt and therefore convicted and sentenced him as already mentioned.

9. Conviction and sentence are assailed in this appeal on two grounds. The first contention is that since the sampling was done from court, there is no evidence at all as to who had taken the sample from the court and the

omission to do is fatal and (2) there is no forwarding note too produced before court and marked. There is also no evidence to show that the specimen seal used is produced before court. In support of his contentions, 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). It is therefore contended that the conviction and sentence cannot stand.

10. The learned Public Prosecutor on the other hand pointed out that PWs 1 and 5 have categorically stated that the contraband was seized from the possession of the accused and there is no reason to suspect their version. They are experienced officers and they can identify the content by smell and taste. There is nothing to show that that they had any reason to falsely implicate the accused. Moreover, the court below has chosen to accept their evidence and there is no reason as to why this Court should

take a different view. Therefore, it is contended that the conviction has only to stand.

11. If one is to accept the evidence of PWs 1 and 5 and also the recital in Ext.P1 mahazar alone to find the accused guilty, probably, the stand taken by the learned Public Prosecutor could be justified. Assuming for argument sake, PWs 1 and 5 are believed and so also the recital in Ext.P1, still the question arises whether the article seized is the article possessed by the accused. Of course, PWs 1 and 5 have stated that by taste and smell, they recognized the contraband article as arrack. But that is not sufficient.

12. A reading of the evidence of PWs 1 and 5 clearly shows that no sample was taken by PW1 from the site of occurrence and the evidence of both PWs 1 and 5 is clear that the sample was taken from the court for the reason that he had made a request to the court to take the samples.

13. It is by now well settled that when the sample is taken from the court, the Thondi Clerk concerned will have

to be examined to prove the due sampling. In the absence of evidence in that regard, the sampling alleged to have been done become suspicious. In the case on hand, there is no evidence to show that the forwarding note is actually produced so that the court is not in a position to ascertain the seal which has been used on the samples that might have been taken from court and send it to chemical analyst for report.

14. Thus, the two points raised by the learned counsel for the appellant will have to be accepted. Merely because, PWs 1 and 5 give parrot like version and there is also Ext.P1 mahazar, it cannot be said that the court below was right in finding against the accused. One of the grounds taken is that unless proper sampling is done and report is obtained, it is not proper to prosecute the person for the offence since the sentence that is to be awarded is excessive.

15. Whatever that be, it is clear from their evidence that the person who had taken the sample has not been

examined. Then there is no guarantee that the sample is taken from the contraband article produced before court on the next day of detection. If that be so, the appellant is entitled to succeed.

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

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P.A. to Judge