

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 21ST DAY OF DECEMBER 2015/30TH AGRAHAYANA, 1937

CRL.A.No.387 of 2006

AGAINST THE JUDGMENT IN SC 110/2002 of ADDL. SESSIONS COURT
(ADHOC)-II, KALPETTA DATED 30-01-2006

APPELLANT/ACCUSED:

RAFY, S/O.ABDUL RAHIMAN,
PAZHAYATTIL COLONY, EDAGUNI, KALPETTA.P.O,
WAYANAD DISTRICT.

BY ADV. SRI.P.NARAYANAN

RESPONDENT/COMPLAINANT:

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

BY SMT.S. HYMA, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
21-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.387 OF 2006

Dated this the 21st day of December, 2015.

J U D G M E N T

The accused was prosecuted for the offence punishable under Section 58 of Abkari Act. He was found guilty and was therefore convicted and sentenced to suffer simple imprisonment for one year and to pay a fine of Rs.1 lakh with default clause of simple imprisonment for three months. Set off as per law was allowed.

2. The prosecution case as could be discerned from the records is as follows:

During the period when the crime was detected, PW3 was the Circle Inspector of Police attached to Kalpetta Police Station. He received reliable information on 01.11.2000 that illegal vending in liquor is going on in the Edakkuni Pazhamthattil Colony and so also playing of cards for money. In order to verify the said information, he is alleged to have sent PW4. PW4

reported that the information is true. That lead PW3 along with team of officers to go to house No.18/29 of Edakkuni Pazhamthattil Colony where the accused is alleged to be staying after preparing the search memo. On reaching the house, they found the accused and three other persons engaged in the game of cards, and the cards and the money were seized by the police. Further search of other rooms was conducted by PW3 and in the second room after the room where the play of cards was going on, it was found that there was a 5 litre can below the cot on the north western corner of the room. On examination, it was found to contain half a litre of arrack. Ext.P3 arrest memo was prepared and the accused was arrested.

3. PW3 took sample in a bottle of 180ml capacity and it was sealed and labeled as is the usual procedure. The balance contraband was also sealed and labeled and on both of them label containing the signature of accused, witnesses and PW3 was affixed. PW3 thereafter returned to the station and registered crime as per Ext.P4 First Information Report. On the next day, accused was produced before court and the property list prepared

is Ext.P5.

4. PW5 conducted investigation of the case. He procured Ext.P1 document which showed that the accused was staying in house No.18/29. In the meanwhile, part of the investigation was conducted by PW6 also. He recorded the statement of witnesses and prepared Ext.P7 scene mahazar. He claims to have prepared forwarding note for sending the sample for chemical analysis. Investigation was completed by PW5 who laid charge before court.

5. The court before which final report was laid took cognizance of the offence and on finding that the offence is exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Kalpetta under Section 209 Cr.P.C after following necessary procedures. The said court made over the case to Additional Sessions Court (Adhoc) II, Kalpetta for trial and disposal. The latter court, on receipt of records and on appearance of accused, framed charge for the offence under Section 58 of Abkari Act, to which, accused pleaded not guilty and claimed to be tried.

6. The prosecution therefore had PWs 1 to 6 examined and Exts.P1 to P8 marked. M.O.1 was got identified and marked.

7. 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.

8. Finding that the accused could not be acquitted under Section 232 Cr.P.C, he was asked to enter on his defence. He had Ext.D1 marked.

9. Relying on the evidence of PWs 3 and 4 and also Ext.P1, court below came to the conclusion that the offence has been made out and accordingly, convicted and sentenced the accused as already mentioned.

10. Sri.P.Narayanan, learned counsel appearing for the appellant, assailed the conviction on several grounds. It was pointed out by the learned counsel that even though search memo is alleged to have been drawn up by PW3, no such search memo is seen marked in the case and therefore the only conclusion possible is that no search memo was prepared.

Learned counsel then drew the attention of this Court to the fact that at the time of arrest, wife of accused was present in the place and strangely enough, a third person was given notice and that creates suspicion. Learned counsel then went on to point out that reliance placed on Ext.P1 cannot be justified in law since that certificate only shows that the accused is staying in the house. It is not seen on what basis that document has been issued and it does not disclose that the accused is the owner of the building. Learned counsel then pointed out that by no stretch of imagination, offence under Section 58 can be attracted to the facts of the case. The accused has been found guilty only on the premises that half a litre of arrack was kept in his house. None of the ingredients necessary to attract Section 58 is neither alleged nor proved in this case and the court below was not justified in holding the accused guilty under Section 58. Learned counsel then went on to point out that even assuming that Section 8 may be attracted, necessarily, the prosecution has to prove that possession or storing of contraband was with knowledge of the accused and the mere fact that he has

permitted somebody to store the article may not attract that section. For the above proposition, learned counsel relied on the decisions in **Ravi** vs. **State of Kerala** (2011 (3) KLT 627) and in **Rajappan V.P.** vs. **State of Kerala** (2015 (5) KHC 895). Learned counsel then went on to point out that defence has marked Ext.D1 which would show that the accused's residence is elsewhere. These aspects have not been considered by the court below and that has resulted in an improper conclusion being drawn on the basis of the evidence adduced in the case.

11. Learned Public Prosecutor, on the other hand, tried to justify the conviction on the ground that the evidence of PWs 3 and 4 are sufficient to show that the accused was residing in the house where the contraband article was found. It is also pointed out that the lower court has chosen to accept the evidence adduced in the case and has found the accused guilty. It could not be said that the finding is perverse or contrary to the evidence on record. If that be so, interference is not called for.

12. After having heard the learned counsel for the appellant, learned Public Prosecutor and also after having

perused the records, there seems to be considerable force in the submission made by the learned counsel for the appellant. It is true that evidence regarding detection and possession etc. are confined to the testimony of PWs 3 and 4 who are Police Officers. Among whom, PW3 is the Circle Inspector of Police. He would say that on receiving information about sale of illicit arrack by the accused, PW4 was sent to make a preliminary enquiry. His further evidence is that PW4 informed that the information is true and thereafter they set out to the house of the accused. At the time of going to the house of accused, PW4 was also along with him. Both PWs 3 and 4 say that as soon as they reached the house and entered the house, they found four persons engaged in playing of cards for money and they were arrested. Then they say that PW3 made further search of the other room and in one of the rooms, they were able to find a 5 litre can which contained half a litre of arrack. Both of them say that sample was taken from the contraband and both the sample and the balance contraband was sealed and labeled and the label contained the signature of PW3, accused and witnesses. PW5, the investigating

officer, says that he obtained Ext.P1 certificate from the local authority showing that the accused was the owner of the house from where the contraband article was seized.

13. In the decision in **Ravi vs. State of Kerala** (2011 (3) KLT 627), the question as to what the words 'possession' and 'storing' would mean was considered. That decision was rendered in the context where it was an admitted fact that one of the accused was allowed other accused to store contraband article in his house. In that context it was held that the person who permitted to do so cannot be held to be in possession or alleged to be storing the contraband article. That was followed in the decision in **Rajappan V.P. vs. State of Kerala** (2015 (5) KHC 895). On the facts of this case, the question that arose for consideration is whether Section 58 is attracted at all.

14. Section 58 of Abkari Act reads as follows:

"58. For possession of illicit liquor.-

Whoever, without lawful authority, has in his possession any quantity of liquor or of any intoxicating drug, knowing the same to have been unlawfully imported, transported or manufactured, or knowing the duty, tax or rental payable under this

Act not to have been paid therefor, shall be punishable with imprisonment for a term which may extend to ten years and with fine which shall not be less than rupees one lakh”.

15. None of the elements or evidence support the offence under Section 58 for the simple reason that the ingredients necessary to attract that section are neither alleged nor proved.

16. As far as Section 8 is concerned, learned counsel for the appellant may be justified in his submission that there is no proof of possession or storing of contraband article by the accused. The prosecution case was built up on the fact that the accused was the owner of the building where the contraband article was found for which they rely on Ext.P1. PW1 is the person who issued Ext.P1. In his evidence, he would say that he has given the certificate as per the records available in the local authority. In Ext.P1, there is no reference to the document based on which the information is passed on to the investigating officer. All what is stated is that on enquiry it was found that the accused was staying in the house. It is not even stated that he was the owner of the house. It is here that one has also to take

note of Ext.D1 voter identity card produced by the accused. That shows that he was staying in another place. Absolutely no reliance can be placed on Ext.P1 to come to the conclusion that the building belongs to the accused or that he is in exclusive possession of the same. The mere allegations cannot attract the penal provision under the Abkari Act. Further that no documents are referred to in Ext.P1 to show on what basis it was issued. If no reliance could be placed on Ext.P1, then it necessarily follows that accused cannot be held to be liable for the contraband found in the house. Apart from the above facts, one significant aspect is that forwarding note Ext.P8 does not contain the sample seal said to have been used by the detecting officer. In the decision in **Krishnan** vs. **State** (2015 (2) KLT SN 8), it was held as follows:

“Ext.P5 is a copy of the Forwarding Note submitted before the court for sending sample for subjecting it to chemical analysis. A specific space is provided in the Forwarding Note for affixing the sample seal. No such sample seal was affixed on Ext.P5. Whether the sample seal was affixed on the original of Ext.P5 sent to the Chemical Examiner?

Normally, if the sample seal is not appearing in the copy of the Forwarding Note, in this case it is Ext.P5, it has to be presumed that such sample seal was not affixed on the original Forwarding Note unless proved otherwise. A copy of the Forwarding Note is kept in the office of the court for serving certain purposes. The purposes are evidence from the contents of the form of the Forwarding Note itself. They include the quantity and description of the sample drawn from the bulk of the contraband, the details of the case and the space for providing the sample impression of the seal affixed on the sample taken from the bulk of the contraband. Therefore, as already stated, the absence of sample seal in the space provided in the copy of the Forwarding Note. Is sufficient reason for presuming that the sample seal is not provided in the original Forwarding Note. Of course, this is only a rebuttable presumption. In the case on hand, such presumption has not been rebutted by the prosecution."

17. The principles laid down in the above decision apply to the facts of the case. It has to be held that the conviction cannot be upheld and it has necessarily to be set aside. I do so.

In the result, this appeal is allowed. The conviction and sentence passed by the court below for the offence under

Section 58 of Abkari Act 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

// True Copy //

P.A to Judge.