

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 16TH DAY OF OCTOBER 2015/24TH ASWINA, 1937

CRL.A.No. 421 of 2006

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AGAINST THE JUDGMENT IN SC 37/2005 of ADDL.SESIONS COURT  
FAST TRACK COURT NO.III (ADHOC) MANJERI.

APPELLANT(S)/ACCUSED:

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APPUNNI, S/O.UNNIPPERAVAN,  
CHAKKUMTHODI, KINARADAPPAN, VETTELAPPARA,  
ERNADU TALUK, MALAPPURAM DISTRICT.

BY ADV. SRI.P.SAMSUDIN

RESPONDENT(S)/COMPLAINANT:

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STATE OF KERALA,  
REPRESENTED BY THE EXCISE INSPECTOR, MANJERI,  
THROUGH THE PUBLIC PROSECUTOR,  
HIGH COURT OF KERALA,  
ERNAKULAM.

BY PUBLIC PROSECUTOR SMT. S. HYMA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON  
16-10-2015, THE COURT ON THE SAME DAY DELIVERED THE  
FOLLOWING:

P. BHAVADASAN, J.

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Crl.Appeal. No. 421 of 2006  
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Dated this the 16<sup>th</sup> day of October, 2015.

JUDGMENT

The accused was prosecuted for the offence punishable under Section 55(g) of the Abkari Act and found guilty. Therefore, he was convicted and sentenced to undergo rigorous imprisonment for four years and to pay fine of Rs.1,00,000/-, in default, to undergo simple imprisonment for six months. Set off as per law was allowed.

2. The prosecution case is that on 17.7.2003 while P.W. 1 and other officers were on patrol duty, they stopped the vehicle near the Forest Station and they saw a person passing by carrying a plastic pot on his head. Feeling suspicious, he was intercepted and pot was seized. It contained about 15 litres of liquid. By smell and taste, it was identified as wash. The accused was arrested on the basis of Ext.P1 arrest memo. P.W.1 took 500 ml. each in two bottles having the capacity of

750 ml as sample from the article seized and claims to have affixed seal and labelled the same in accordance with law. The label contained the signature of the accused, the witnesses and P.W.1. He says that rest of the quantity of the wash was destroyed at the spot. Mahazar prepared is Ext.P2. They returned to the office and registered crime as per Ext.P4 occurrence report. On the next day, they produced the articles, the documents and the accused before court. He sent the forwarding note also to court. P.W.5 took over investigation and he obtained the chemical analysis report. He completed investigation and laid charge before court.

3. The court, before which final report was laid, took cognizance of the offence. Finding that the offence is exclusively triable by a court of Sessions, the said court committed the case to Sessions Court, Manjeri under Section 209 Cr.P.C. The said court made over the case to Additional Sessions Court Fast Track No.III (Adhoc), Manjeri for trial and

disposal.

4. The latter court, on receipt of records and on appearance of the accused framed charge for the offence punishable under Section 55(g) of the Abkari Act. To the charge, the accused pleaded not guilty and claimed to be tried. The prosecution therefore had P.Ws.1 to 5 examined and had Exts.P1 to P9 marked. M.Os.1 and 2 were got identified and marked. After the close of the 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. Finding that the accused could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. Exts. D1 and D2 were produced on the defence side.

5. The court below, greatly impressed by the evidence of P.Ws. 1 and 2 and also the contemporaneous document and fortified by the chemical analysis report, found

the accused guilty. Conviction and sentence as already mentioned followed.

6. Learned counsel appearing for the appellant assailing the conviction and sentence, pointed out that apart from the fact that there is no evidence to show even assuming that the accused was carrying wash, it was for the purpose of illicit distillation. Merely because a person carried wash, one cannot jump to the conclusion that it is for illicit distillation. Even if possession of wash as such may not be an offence, according to learned counsel, unless it falls within Section 55 (g) of the Abkari Act, which mentions that uses, keeps or has in his possession any materials, utensil, implement or apparatus for the purpose of manufacturing liquor other than toddy or any intoxicating drug. Highlighting this aspect, learned counsel pointed out that the article seized from the possession of the accused must be one for manufacturing liquor other than toddy. In the absence of any evidence to

establish the case of distillation, the accused could not have been found guilty.

7. There seems to be considerable force in the contentions raised by the learned counsel for the appellant. Section 53A was introduced in the Act by way of Amendment Act 1 of 2003 from 3.9.2002. The detection in the case on hand is on 17.7.2003. It means that the detection was after the commencement of the Amendment Act which brought in Section 53A to the Act. Section 53A stipulates the manner and method by which the Abkari Officer or such other officer can destroy the wash or contraband article to prevent it being kept for long time either in the police station or in court. Section 53A reads as follows:

“53A. Disposal of seized liquor, intoxicating drugs or articles.– (1) Notwithstanding anything contained in this Act, the State Government may having regard to the nature of the liquor, intoxicating drug, or article, their vulnerability to theft, substitution, constrains of proper storage space or any other relevant

consideration, by notification in the official Gazette, specify such liquor, intoxicating drug or article which shall, as soon as may be after their seizure, be disposed of by the authorized officer referred to in section 67B, in such manner as the Government may, from time to time determine after following the procedure hereinafter specified.

(2) Where any such notified liquor, intoxicating drug, or, article has been seized under this Act, the authorized officer shall prepare an inventory of such liquor, intoxicating drug or article containing such details relating to their description, quality, quantity, mode of packing, marks, numbers of such other identifying particulars of the liquor, intoxicating drug or article or the packing containers in which they are kept, place of origin and other particulars, as the authorized officer may consider relevant to identify the liquor, intoxicating drug or article in any proceedings under this Act and make an application to any Magistrate for the purpose of. –

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate photographs of such liquor, intoxicating drug or article and certifying such photographs as true; or

© Allowing to draw representative samples of such liquor, intoxicating drug or article in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section 2) the Magistrate shall, as soon as may be, allow the application.

(4) Where any liquor or intoxicating drug or article under this Act has been kept under the custody of any court in connection with any offence committed under this Act, before the commencement of the Abkari (Amendment) Ordinance, 2002 or has been brought before a Magistrate without complying the procedure laid down in sub-section (2), the authorized officer shall obtain prior permission of the court or Magistrate before initiating proceedings under sub-section (2).

(5) Notwithstanding anything contained in the Indian Evidence Act 1872 (Central Act 1 of 1872) or the Code of Criminal Procedure, 1973 (Central Act 2 of 1974) any Court trying an offence under this Act, shall treat the inventory, the photographs of liquor,

intoxicating drug or article and any list of samples drawn under sub sections (2) and (4) and certified by the Magistrate, as primary evidence in respect of such offence.

Explanation.– 'Article' for the purpose of this section includes jaggery and other like substances, the value of which depreciates in passage of time.”

It also provides the procedure to be followed by the officer concerned who desires to destroy the balance content inspite of sending it to court. In the case on hand, there is nothing to show that this provision has been complied with.

8. The consequence is that in the absence to produce those documents and in the absence of following the procedures made mention of in Section 53A, it may not be possible for this Court to find that even if the sample is taken, it is the same sample which is sent for chemical analysis.

9. The contention that mere possession of wash by itself is not a ground to hold the accused guilty may not be easily brushed aside. Going by the Section, the prosecution

has to prove for what purpose the wash was carried by the accused. In the case on hand, except for saying that accused was apprehended with wash in his possession, there is no material to show that he was either involved in distillation of arrack or intended to engage in illicit distillation with the wash in his possession.

For the above reasons, this appeal is allowed, the conviction and sentence passed by the trial court are set aside and it is held that the prosecution has not succeeded in proving the guilt of the accused beyond reasonable doubt. The accused is acquitted of the charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

P. BHAVADASAN,  
JUDGE

sb.