

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 17TH DAY OF NOVEMBER 2015/26TH KARTHIKA, 1937

CRL.A.No. 434 of 2006

AGAINST THE JUDGMENT IN SC 277/2001 of ADDITIONAL DISTRICT &
SESSIONS COURT (FAST TRACK COURT-1), THIRUVANANTHAPURAM
DATED 04-01-2006

APPELLANT/ACCUSED:

ABDUL SALAM, AGED 55, S/O.RAGHAVAN,
MARIYAMVILAKAM VEEDU, PADICKAVILAKAM,
KADINAMKULAM VILLAGE, KADINAMAKULAM DESOM.

BY ADVS.SRI.R.T.PRADEEP
SRI.V.VIJULAL

RESPONDENT-RESPONDENT:

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

BY SMT. LILLY LESLIE, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
17-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 434 of 2006

Dated this the 17th day of November, 2015.

JUDGMENT

A father and son were prosecuted for the offence punishable under Section 55(a) of the Abkari Act. The son, namely, the second accused, was acquitted, while the father suffered conviction and sentence of rigorous imprisonment for two years and fine of Rs.1,00,000/- with a default sentence of rigorous imprisonment for one year.

2. The prosecution case in brief is that on 13.12.1998, while P.W.3 was working as Sub Inspector of Kadinamkulam Police Station, he along with his colleagues had gone on routine patrol duty. By about 5 p.m. when they reached Padikkavilakom temple, they came to know that the accused were carrying on sale of liquor. When they reached the place of incident, they found the first accused holding a black cover and the second accused taking out a packet out of

the cover and putting it down. As officers approached them, they tried to run away but they were intercepted and 75 packets, each containing 100 ml liquid, were recovered from them. By taste and smell of the contents of one of the packets, it was identified as arrack. Ext.P2 mahazar was prepared, in which P.W.3 and the witnesses signed. The packets containing arrack were put in the cover and sealed. He then reported to the station and registered crime as per Ext.P3 FIR. The accused and the articles were produced before court. He conducted a part of the investigation. He made a requisition to the court to take sample and send it for chemical analysis, along with the forwarding note.

3. P.W.5 had gone along with P.W.3. P.W.4 was the Circle Inspector at the relevant time. He verified the investigation said to have been conducted by C.W.6 and after making necessary corrections laid charge before court.

4. The court, before which final report was laid, took cognizance of the offences. Finding that the offence is one exclusively triable by a court of Sessions, the said court committed the case to Sessions Court, Thiruvananthapuram under Section 209 Cr.P.C. after following the requisite procedures. That court made over the case to Additional District and Sessions Court Fast Track-I), Thiruvananthapuram for trial and disposal.

5. The latter court, on receipt of records and on appearance of the accused framed charge for the offences punishable under Section 55(a) of the Abkari Act, to which 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 P3 marked. M.Os.I and II were identified and marked. Ext.D1 was marked from the defence side. After the close of the prosecution evidence, the accused were questioned under Section 313 Cr.P.C. wherein they denied all

the incriminating circumstances brought out in evidence against them and maintained that they were innocent. Finding that the accused could not be acquitted under Section 232 Cr.P.C., they were asked to enter on their defence. They chose to adduce no evidence.

6. On analysis of the evidence, the trial court came to the conclusion that the evidence of P.Ws. 3 and 4 are sufficient to found the first accused guilty, whereas there are no materials to fasten liability on the second accused resulting in the second accused being acquitted of the charges and conviction of the first accused. Therefore, the first accused was sentenced as already mentioned.

7. Assailing the conviction and sentence of the first accused, learned counsel appearing for the appellant contended that there is considerable ambiguity regarding sampling alleged to have been done by the authorities concerned, which made the prosecution case weak. Referring

to the evidence of P.W.3, it is contended that, in chief examination P.W.3 has stated that all the 75 packets were packed and produced before the police station. But in cross-examination, it was stated that all the covers were emptied and the empty covers alone were produced before court. But referring to the property list produced, going by the narration in the property list submitted by P.W.3, it would appear that all the 75 packets were produced. Apart from this anomaly, in Ext.P2 mahazar, which P.W.3 claims to have been prepared at the spot, does not mention of drawing of a sample by P.W.3. In fact, the evidence would show that he had submitted a forwarding note to the court requesting the court to take sample and forward it to the laboratory. The result is that there is no evidence as to who had taken the sample and when it was taken and where it was taken. The result is that, according to the learned counsel, there is no guarantee that the sample which reached the laboratory is the sample taken

from the contraband article seized from the possession of the first accused. This deficiency in evidence is sufficient for an acquittal.

8. Learned Public Prosecutor pointed out that evidence of P.Ws. 3 and 5 clearly show that the articles were seized from the possession of the first accused. They speak about having prepared Ext.P2. The ambiguity in sampling need not detain this Court as there is the evidence of P.Ws. 3 and 5 which the court below had chosen to accept, and there is reason to reject the same. The conviction and sentence are only to stand.

9. Even after best efforts, this Court finds it extremely difficult to accept the contention raised by the learned Public Prosecutor. It is not sufficient for the prosecution to show that the contraband articles have been seized. They would show that the articles seized are banned articles and possession of which creates an offence. As rightly

pointed out by the learned counsel for the appellant, Ext.P2 mahazar which P.W.3 claims to have drawn up at the place of incident itself does not say that sample had been taken at the spot. In fact as rightly pointed out by the learned counsel for the appellant, a perusal of the property list, which is not seen marked in the case, but it is among the records being the document to be looked into by the prosecution show that 75 covers, each containing 100 ml liquid were seized. If that be so, P.W.3 might have emptied all the 75 packets and only the covers were produced before court. Therefore, the evidence of P.W.3 does not go in tune with the property list produced by him.

10. Apart from the above anomaly, P.W.3 has no case that he had taken any sample of the contraband at the place of incident nor has he a case that after returning to the police station, he had taken sample. In fact his evidence would reveal that he had preferred a forwarding note to the

court seeking the aid of the court to take sample. If that be so, the sample must have been taken from the court.

11. It is by now well established that in such cases, it is absolutely necessary to examine the thondi clerk who might have taken the sample under orders of the Presiding Officer to establish that the sample which reached the laboratory is the sample taken from the contraband seized from the possession of the accused. There is no such evidence in the case on hand.

12. The result is that there is absolute infirmity regarding the person who had taken the sample and sent it for chemical examination. Thus, as rightly pointed out by the learned counsel for the appellant, there is no guarantee that the sample sent for chemical analysis is the sample taken from the contraband seized from the possession of the accused. If that be so, the conviction cannot stand.

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.