IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 26TH DAY OF NOVEMBER 2015/5TH AGRAHAYANA, 1937

CRL.A.No. 2 of 2009 (A)

---

AGAINST THE JUDGMENT IN SC 216/2006 of ADDL. SESSIONS COURT (ADHOC)-II, KALPETTA DATED 12-12-2008

APPELLANT/ACCUSED:

---

V.K.SANKARAN, S/O. KEYAVU,
ONIYIL VEEDU, KOTTUKULAM, MUNDAKUTTY,
KUPPADITHARA.

BY ADV. SRI.S.M.PRASANTH

RESPONDENT/COMPLAINANT:

---

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

BY SMT. LILLY LESLIE, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 26-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**P.BHAVADASAN, J.**

**----------**

**Crl. Appeal No.2 OF 2009**

**----------**

**Dated this the 26th day of November, 2015.**

**J U D G M E N T**

The accused in this case was prosecuted for the offence punishable under Section 55(g) of Abkari Act. He was found guilty and was therefore convicted and sentenced to suffer rigorous imprisonment for one year and to pay a fine of Rs.1 lakh with default clause of rigorous imprisonment for six months. Set off as per law was allowed.

2. Incident in this case occurred on 08.03.2005. PW1, at the relevant time, was working as Preventive Officer attached to Excise Circle Office, Kalpetta. On the date of incident, he and his companion officers, as usual, set out for patrol duty and when they reached near the Ovupalam, they found the accused coming from beneath the bridge with a red plastic utensil and aluminum vessel. Hearing the sound of the jeep and seeing the Excise Officials, he tried to hide himself. He was approached by the officers in the Excise Department and asked him what which he

had with him. The vessel had a capacity of 18 liters and they found 15 liters of liquid in it. The liquid was then stirred and by taste and smell, it was found that it was wash intended to make arrack. The aluminum vessel had a capacity of 45 liters and that too contained wash. They also found a tin container of 18 liters capacity and that also contained wash. They then found an aluminum vessel of 15 liters capacity with a wooden disk inside it. According to PW1, the accused is said to have admitted that all these articles belonged to him. Pointing out that what he had done is illegal act, Ext.P1 arrest memo was prepared and he was arrested. From the wash so seized, 500ml was taken in a bottle and it was sealed and labeled. The label contained the gist of the case and also both the labels i.e. on the sample and also on the balance contraband article, signature of PW1, witnesses and accused were affixed. The excess wash was destroyed at the place of incident itself. The mahazar prepared at the place of incident is Ext.P2. On the same day itself, accused, articles seized and the records were handed over to the Kalpetta Range Office. The seal affixed on the sample was affixed on the

forwarding note also.

3. Investigation was taken over by PW3 who was the Preventive Officer at the relevant time. On the basis of the records produced by PW1, he registered crime as per Ext.P4 occurrence report. Ext.P5 is the property list prepared by him. The rest of the investigation was done by PW4. He claims to have produced the articles before court. After receiving the articles from court, he kept them under his safe custody. Statements of witnesses were taken, investigation was completed and final report was laid.

4. 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. 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 the accused, framed charge for the offence under Section 55(g) of Abkari Act. To the charge, accused pleaded not guilty and claimed to be tried.

5. The prosecution therefore had PWs 1 to 7 examined and Exts.P1 to P8 marked. M.O.s 1 to 4 were got identified and marked.

6. 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.

7. Finding that the accused 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. The court below found that the accused was in possession of wash and then formed the opinion that the wash held by the accused was for the purpose of distillation. Holding so, he was found guilty. Conviction and sentence as already mentioned followed. The said conviction and sentence are assailed in this appeal.

9. Learned counsel appearing for the appellant contended that it is not clear from the evidence as to from where the sample had actually been taken and if that be so, it could not be said

that sample which reached the chemical analysis laboratory is the sample taken from the contraband seized from the possession of accused. There are several utensils, according to the prosecution, which contained liquid and it was incumbent on the part of the officer to take separate samples from each of the utensil and seal and label the same. Admittedly, in the case on hand, PW1 has clearly stated that he has taken only one sample. He is unable to mention from where the sample was taken. This lacuna is fatal to the prosecution and therefore the appellant could not have been found guilty. Alternatively, it is contended that even assuming that wash is recovered from the possession of accused, unless it is shown that it was intended for manufacturing illicit liquor, he could not be fastened with liability. For the said proposition, learned counsel relied on the decision in ***Santhosh*** *vs.* ***State of Kerala*** (2007 (1) KHC 1032). Learned counsel then went on to point out that the prosecution relied on the alleged admission made by the accused that the articles belonged to him. Even assuming it is so, according to the learned counsel, that amounts to a confession and it is

inadmissible in evidence since PW1 is an Abkari Officer and he has the power of a Police Officer. For the said proposition, learned counsel relied on the decision in ***Joseph*** *vs.* ***State of Kerala*** (2009 (4) KHC 537). Therefore, it is pointed out that the fact that other utensils were recovered from beneath the bridge and the accused is attributed with possession of the same cannot help the prosecution. On the basis of the above contentions, it is pointed out that the court below has grievously erred in convicting the accused.

10. Learned Public Prosecutor, on the other hand, contended that at any rate the accused was found to be actually holding a red plastic pot which contained wash and from which sample has been taken. This is clear from the evidence of PWs 1 and 2 and there is no reason to suspect them. Learned Public Prosecutor also went on to contend that aluminum vessels containing wash were also recovered and these recoveries lead to the conclusion that wash which was seized from the possession of accused was intended for manufacturing of illicit liquor. The court below, according to the learned Public Prosecutor, has

analysed the evidence and has come to the conclusion that offence under Section 55(g) of Abkari Act is made out. It is contended that no grounds are made out to interfere with the conviction and sentence.

11. The prosecution case mainly rests on the evidence of PWs 1 and 2. Among them, PW1 is the detecting officer and he was functioning as Preventive Officer at the relevant time. He would say that he along with PW2 who was a Guard then with a few other officers had set out for routine patrol duty and when they reached the place of incident, they happened to see the accused carrying a red pot. PWs 1 and 2 would say that seeing the Excise Officers, he became nervous and tried to hide himself which caused suspicion in the mind of officers. He was intercepted and the pot was seized and examined. It was seen to contain a liquid. PW1 would say that he, by taste and smell, recognised it to be wash. Both PWs 1 and 2 do say that sample was taken by PW1 from the pot and had sealed and labeled the same. They also say that thereafter they returned to the Range Office and handed over the articles, accused and documents to

the then Station House Officer.

12. A reading of the evidence of PWs 1 and 2 leave one in no doubt that the accused was found in possession of red pot. The question as to whether the other utensils which were found beneath the bridge belonged to the accused, it was the stand of the Excise Officials that since the accused tried to hide himself behind the bridge, the other utensils also could be attributed to be in possession of accused. The solitary basis on which the court below held to be so has that the accused told the Excise Officers that it belonged to the accused. That is a confession statement made to an authorised Excise Officer. It is well settled by now that Excise Officers holding such powers are equivalent to Police Officers and any statement made to them by accused amounts to confession. If there is any doubt, that is discussed in ***Joseph*** *vs.* ***State of Kerala*** (2009 (4) KHC 537) wherein it was held as follows:

> "15. ..... In the case of a non-police officer, he does not, therefore, have the authority to file a police report under Section 173(2) CrPC. Until the amendment of Section 50 of the Abkari Act, all abkari officers were authorised to file only complaints

> and cognizance of the offences under the Abkari Act was being taken on such complaints. But after the amendment of Section 50, Abkari Officers can only file a final report in accordance with Section 173(2) CrPC thereby transforming Abkari Officers also to the status of police officers. With effect from 03/06/1997 in all prosecutions under the Abkari Act, Abkari Officers are filing police reports (charge-sheets) as provided under Section 173(2) CrPC. Hence any confession made to an abkari officer after 03/06/1997 will be deemed to be a confession made to a police officer within the meaning of Section 25 of the Evidence Act and will stand interdicted by the said Section. If so, the confession made by the appellant to PW1 Excise Inspector cannot be relied on as an incriminating piece of evidence".

13. Apart from the so called admission said to have been made by the accused, there is absolutely no evidence at all to show that utensils were owned by the accused or were in his possession.

14. It must be noticed that the prosecution has no case that illicit distillation was being carried on below the bridge. In fact, prosecution case that it was being done in a colony far away. One must remember that seizure of aluminum utensil etc.

is from an open place and it is inconceivable that a person who is engaged in distillation in a colony will keep his utensils in an open place which is easily accessible for anybody. The attribution of possession of utensils therefore to the appellant cannot be countenanced. Finally, even if the prosecution case is taken as true, question arises is whether that is sufficient to attract the offence under Section 55(g) of Abkari Act. It will be useful at this point of time to refer to the provision as such. Section 55(g) reads as follows:

> **Section 55. For illegal import, etc.-** Whoever in contravention of this Act or of any rule or order made under this Act
>
> .....
>
> (g) uses, keeps, or has in his possession any materials, still, utensil, implement or apparatus whatsoever for the purpose of manufacturing liquor other than toddy or any intoxicating drug".

15. A bare reading of the provision leaves one in no doubt that mere possession of any materials, still, utensil, implement or apparatus by itself does not constitute an offence unless it is shown that it was kept or was in possession with the object of

manufacturing liquor other than toddy. Therefore there is an element of mens ria involved in the case. It is not sufficient for the prosecution to show that the commodities which could be used for manufacture of liquor were in possession of accused. They must further go to show that the accused was in possession of the same with the intention of using it for manufacturing liquor. In the decision in ***Santhosh*** *vs.* ***State of Kerala*** (2007 (1) KHC 1032), in fact, this issued was gone into and this Court held as follows:

> "11. In short, there is no semblance of specific allegation which can indicate that the possession of the articles in question was for the purpose of manufacturing liquor. Possession simpliciter of articles which can be used for the purpose of manufacturing liquor also cannot be in the absence of cogent and probative indications be assumed to be possession for the purpose of manufacturing illicit liquor as to justify indictment under Section 55(g) of the Abkari Act. I am, in these circumstances, persuaded to agree that this is an eminently fit case where premature termination of the proceedings by invocation of the extraordinary inherent jurisdiction under Section 482 of the CrPC shall be justified. Lest, there be any confusion and to disabuse any

> such incorrect impression which may be carried, I make it clear that it is not the law that possession of such materials by itself will not amount to an offence under Section 55(g) of the Abkari Act. The crucial question is whether there is satisfactory allegations or materials to show that such possession was for the purpose of manufacturing liquor. I choose to invoke the jurisdiction under Section 482 of the CrPC in this case for the crucial reason that there is no worthwhile allegation or circumstances to indicate or suggest that the possession of the articles in question was for the purpose of manufacturing liquor".

16. Though, not under Section 55(g), issue was considered with regard to offence alleged to have been committed under Section 55(i). Section 55(i) speaks about selling or storing for sale liquor or any intoxicating drug. This Court had occasion to hold that mere possession of liquor does not ipso facto lead to the conclusion that it is for sale. There has to be some evidence in that regard and there has to be indication to show that storage of contraband article was entitled for sale.

17. In the case on hand, there is absolutely no evidence to show that wash which is alleged to be in possession of accused

was intended for manufacturing of liquor. There is no evidence at all to show that he was involved in actual manufacture of liquor. Further, it is significant to notice that the allegation is that he used to manufacture liquor in a colony far away from the bridge from where the article was seized. There was no attempt from the side of the prosecution to prove that he, in the colony, used to be engaged in manufacture of liquor so as to warrant a conclusion that wash which was in possession of accused and which was detected by the Excise Officers was kept for the purpose of manufacture of liquor. If it was established that articles were recovered either from his house or from the place where he has access, probably, one could have assumed that possession of wash was for the purpose of manufacture of liquor. Unfortunately for the prosecution, there is no such evidence in this case at all.

18. Therefore, mere possession of wash does not amount to an offence unless it is shown that it is intended for manufacture of liquor. If that be so, it is difficult to confirm the conviction of the court below.

For the above reasons, this appeal is allowed. The conviction and sentence passed by the court below 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.