

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.444 of 2006

AGAINST THE JUDGMENT IN SC 110/2005 of ADDL.SESIONS COURT
(ADHOC)-II, THODUPUZZHA DATED 16-02-2006

APPELLANT/ACCUSED:

JOSE, S/O.PAPPY, VILANGARA HOUSE,
KANNADIMADAM LAYAM, MLAMALA ESTATE, MANCHUMALA VILLAGE
PEERMEDU.

BY ADV. SRI.K.SUNILKUMAR

RESPONDENT/COMPLAINANT:

THE STATE OF KERALA, REPRESENTED 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.444 OF 2006

Dated this the 26th day of November, 2015.

J U D G M E N T

The accused was prosecuted for the offence punishable under Sections 55(a) and 55(i) of Abkari Act. He was found guilty on both counts 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 three months.

2. The prosecution case in brief is that on 08.02.2003, while PW1, Preventive Officer attached to Vandiperiyar Excise Range office along with his team of officers were on patrol duty, they were informed that at a place called Nalukandam near to Panchayath well, a person is engaged in sale of liquor. The excise team set out to that place. By about 6 p.m, they reached near the Panchayath well. They happened to see a person with a bottle in his hand. Seeing the Excise Officials, he dropped the bottle and took to his heels. When the place where the accused

was standing was inspected, they could recover a plastic bottle having a capacity of 1 liter containing 250 ml of Rum. By taste and smell, it was confirmed to be liquor. They also found a glass having the smell of liquor. They also found three other bottles of different capacities containing XXX Rum. From the four bottles so recovered, four samples were drawn of 200 ml each in bottles of 375ml capacity. Both the samples and the balance contraband was sealed and labeled and the label contained the signature of witnesses and PW1. PW1, after detection of offence, returned to the office and handed over the contraband articles and the documents to PW6.

3. PW6 was the then Assistant Excise Range Inspector of the station. On the basis of the report filed by PW1, he registered crime as per Ext.P2 occurrence report. He prepared the property list Ext.P3 and had it produced before court.

4. Subsequent investigation was done by PW5 who too was Assistant Excise Inspector. He completed the investigation in the case, took statement of witnesses and through CW9 had the final report laid.

5. The court before which final report was laid took cognizance of the offence and finding that the offence is exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Thodupuzha. The said court made over the case to Additional Sessions Court (Adhoc)-II, Thodupuzha for trial and disposal. The latter court, on receipt of records and on appearance of accused, framed charge for the offence under Sections 55(a) and 55(i) of Abkari Act. The accused pleaded not guilty to the charge and claimed to be tried.

6. The prosecution therefore had PWs 1 to 6 examined and Exts.P1 to P4 marked. M.O.s 1 to 4 were 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 pointed out that he has been falsely implicated.

8. 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.

9. On appreciation of the material before it, court below came to the conclusion that the offence had been made out. Accordingly, convicted and sentenced the accused as already mentioned. The said conviction and sentence are assailed in this appeal.

10. Learned counsel appearing for the appellant contended that the conviction cannot stand for more reasons than one. It is pointed out that PW6, who conducted a major portion of the investigation, was only an Assistant Excise Inspector who was incompetent at the relevant time to exercise the power of an Abkari Officer and any act done by him is non est in law. It is further contended that even assuming that bottles and glasses were seized, that is not sufficient and the prosecution is bound to prove that he was actually engaged in sale of liquor or he had kept the article for sale. There is want of evidence in that regard and for the said purpose, learned counsel relied on the decision in **Sabu vs. State of Kerala** (2007 (3) KHC 753). Added to all these is the fact that forwarding note containing sample seal is also absent in the present case. In the case on hand, it is not

seen marked. Therefore, there is no guarantee that the sample sent to the chemical analysis laboratory is the sample taken from the contraband seized from the possession of accused. These grave irregularities and infirmities may vitiate the conviction.

11. Learned Public Prosecutor, on the other hand, contended that the evidence of PWs 1 and 2 are sufficient to show that accused was in possession of liquor for sale and the court below has accepted their evidence in that regard. It is pointed out by the learned Public Prosecutor that there is nothing wrong in appreciation of evidence by the court below and merely because a different view may be possible, it is not justifiable to interfere with the conviction.

12. The evidence regarding detection of offence and seizure is confined to the oral testimony of PWs 1 and 2. Among them, PW1 was then functioning as Preventive Officer. PW2 was also a Preventive Officer. Both of them say that on the date of incident they set out for patrol duty and on the way they were given to understand that the accused was engaged in sale of illicit liquor. They proceeded to the spot and according to PWs 1 and 2, when

they reached near the Panchayath well, accused happened to note them and he threw down the bottle which he had and took to his heels. Both of them say that they went to the place where accused was found standing and examined the site. They were able to recover four bottles of Indian Made Foreign Liquor and few glasses there. These, of course, lead to the conclusion, according to learned Public Prosecutor, that sale has actually been done or was going on or is intended by the accused. It is therefore contended that no interference is called for in the findings of the court below.

13. At the outset itself, it may be mentioned that it is difficult to understand how Section 55(a) of Abkari Act can be attracted to the facts of the case. None of the ingredients necessary to attract Section 55(a) is available in the case on hand. So that conviction under Section 55(a) cannot stand.

14. Coming now to the question of Section 55(i) of Abkari Act, evidence of PWs 1 and 2 assume importance. As already stated, they speak about detection. They also speak about sampling done by them. There is no case for the accused that

they had any ill will or oblique motive to falsely implicate him. Therefore the contention that he had no role to play in the crime cannot be accepted. Moreover, evidence of PWs 1 and 2 is further corroborated by the contemporaneous document i.e. the mahazar and also the chemical analysis report. However, there is one lacuna in this regard. As has been held in the decisions in **Majeedkutty vs. Excise Inspector** (2015 (1) KLT 624) and in **Krishnan vs. State** (2015 (2) KLT SN 8), it was absolutely necessary for the Investigating Officer to produce forwarding note containing sample seal. Probably, one could have excused that non production if the mahazar produced contained the sample seal. That is also not available. Therefore the court had no opportunity to compare the seal which is alleged to have affixed on the sample and therefore, it follows that there is no guarantee that the sample sent for chemical analysis is the sample taken from the contraband seized from the possession of accused. On this ground also, the prosecution has to fail and finally, all that is found is that the accused was standing with a bottle of liquor which he dropped and then took to his heels.

Assuming for argument sake that all what the prosecution says is true, they were able to recover four bottles and a glass. It does not automatically lead to the inference that liquor is intended for sale or that sale had actually been carried on by the accused.

15. In the decision in **Sabu vs. State of Kerala** (2007 (3) KHC 753), it was held as follows:

“The prosecution case, on the evidence of PWs 3, 4 and 5, is that the appellant was found in possession of 15 bottles of Indian Made Foreign Liquor for the purpose of sale. But, none of these witnesses had given any evidence with regard to any attempt made by the appellant to sell the liquor. Likewise, these witnesses did not adduce any evidence to show that the Indian Made Foreign Liquor found in the possession of the appellant was imported. PWs 1 and 2, the independent witnesses also turned hostile to the prosecution. That apart, in the decisions reported in *Surendran v. Excise Inspector*, 2004 (1) KLT 404 and *Sudhepan @ Aniyam v. State of Kerala*, 2005 (2) KLD (Cri) 631 this Court had categorically held that to attract an offence under S.55(a) of the Abkari Act, the prosecution should specifically allege and prove that the contraband articles found in the possession of the accused were in connection with export, import,

transport or transit. In the light of the above principle, the finding of the trial court that the appellant committed offence punishable under S.55(a) of the Abkari Act is not sustainable”.

16. There is no whisper by PWs 1 and 2 that they had any indication of the accused having been engaged in sale or having stored the article for sale. In the absence of proving these ingredients, the offence cannot be attracted.

17. For the above reasons, this Court is unable to uphold the conviction of the accused for the offences under Sections 55 (a) and 55(i) of Abkari Act and they have necessarily to be set aside.

In the result, this appeal is allowed. The conviction and sentence passed by the court below for the offences under Sections 55(a) and 55(i) of Abkari Act are set aside and it is held that the accused is not guilty of the offences. 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