IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

WEDNESDAY, THE 27TH DAY OF MAY 2015/6TH JYAISHTA, 1937

CRL.A.No. 652 of 2004 ( )

AGAINST THE JUDGMENT IN SC 368/2003 of THE COURT OF ADDITIONAL SESSIONS JUDGE (ADHOC-i), ERNAKULAM DATED 10-03-2004

APPELLANT(S)/ACCUSED:

PRASAD S/O. CHATHAN, AAKKATTUKUDY HOUSE,
EZHUPURAM KARA, THEKKEVAZHAKKULAM VILLAGE.

BY ADVS.SRI.P.V.AUGUSTINE
SRI.BOBY AUGUSTINE
SRI.SAGAR P.U.
SRI.EBY AUGUSTINE

RESPONDENTS/COMPLAINANT:
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1. STATE OF KERALA, REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA

2. THE EXCISE INSPECTOR, PERUMBAVOOR RANGE

BY PUBLIC PROSECUTOR SMT.LALIZA.T.Y.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 27-05-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.T.RAVIKUMAR, J.

Crl. Appeal No.652 of 2004

Dated 27th May, 2015

JUDGMENT

This appeal is directed against the judgment of conviction rendered by the Court of Additional Sessions Judge (Adhoc-I), Ernakulam in S.C.No.368 of 2003. The appellant - accused was tried for the offence under Section 55(g) of the Abkari Act and he was found guilty, convicted thereunder and sentenced to undergo rigorous imprisonment for a period of three years and to pay a fine of ₹1,00,000/-. In default of payment of fine he was ordered to undergo simple imprisonment for one year.

2. The case of the prosecution is that on 8.5.2001 at about 1.15 P.M. PW1, the Excise Inspector, Perumbavoor along with his party were conducting patrol duty. When they reached near Ezhippuram they got information regarding distillation of arrack in the house of Aakkattukudyveettil Chathan situated at south Vazhakkulam Panchayath. PW1 then prepared a search memorandum on finding that any delay in obtaining search warrant would prevent the execution. After recording his reasons and grounds for believing that such offence was being conducted there, they reached there and

conducted search of house No.VP-3/259 (old No.VP-6/500) of Vazhakkulam Panchayath. The appellant-accused alone was found therein and he was found handling Wash at the time of search. 20 litres of wash was found kept in a bucket below the kitchen slab and about 10 litres of hot Wash in an Aluminum pot having a capacity of 15 litres. On identifying the same as Wash used for distilling arrack the Wash, utensils and other vessels were seized under Ext.P1 mahazar and sample was taken in a bottle having a capacity of 750 ml. from the Wash. They were sealed and labelled. Ext.P2 search list was prepared by PW1. The accused was arrested under Ext.P3 arrest memo and his arrest was intimated to PW2, Gopalan who is a close relative of the accused, under Ext.P4 intimation. Thereafter, the accused and the contraband articles were taken to Excise Range Office, Perumbavoor and PW1 registered Ext.P5 crime and occurrence report. PW1 prepared Ext.P6 forwarding note and sent the sample through court for chemical analysis. Ext.P9 is the report of the chemical analyst to the effect that Ethyl alcohol was detected in the sample and it contained 2.81% by volume of ethyl alcohol. PW1 thereafter questioned PW2- Gopalan and one Kumaran and Chathan, who is the father of the accused. PW3 verified the investigation conducted by PW1 and laid the final report before the Court of the Judicial First Class Magistrate, Perumbavoor. On being committed to the

Court of Session it was taken on file and numbered as S.C. No.368 of 2003. It was then made over for trial and disposal to the Court of Additional Sessions Judge (Adhoc-I), Ernakulam. Later, after a preliminary hearing charge under section 55(g) of the Abkari Act was framed against the appellant and it was read over and explained to him. He pleaded not guilty and claimed to be tried. The prosecution has examined PWs 1 to 4 and got marked Exts.P1 to P9 besides identifying MOs 1 to 6 to establish the charge against the appellant. After closure of the evidence of the prosecution the appellant herein was questioned under section 313, Cr.P.C and he denied all the incriminating circumstances put to him. On finding that there was no valid ground to acquit the appellant under Section 232, Cr.P.C. he was called upon to enter on his defence. Nonetheless, the appellant did not adduce any evidence in defence. On appreciating the evidence the trial court found that the appellant-accused had committed the offence under Section 55(g) of the Abkari Act and consequently he was convicted thereunder and sentenced as aforesaid. The appellant herein assails the judgment of conviction raising manifold contentions.

3. This appeal is of the year 2004 and has been in the list for hearing for several weeks. When this matter is taken up for

consideration there was no representation for the appellant. Taking note of the fact that the appeal is of the year 2004 I am inclined to consider the appeal on merits.

4. I have heard the learned Public Prosecutor.

5. I have already adverted to the case of the prosecution and also took note of the fact that to bring home the charge against the appellant the prosecution had examined PWs 1 to 4 and got marked Exts.P1 to P9 besides identifying MOs 1 to 6. PW1 is the detecting officer. He would depose that on 8.5.2001 he along with his party was conducting patrol duty and when they reached near Ezhippuram they got information that distillation of arrack was being conducted from the house of Aakkattukudyveettil Chathan situated at south Vazhakulam Village. PW1 would depose that thereupon he prepared a search memorandum and upon finding that any delay in obtaining search warrant under Section 30 of the Abkari Act would prevent execution thereof, recorded his reasons and grounds for such belief and conducted search of house No.VP-3/259 (Old No.VP-6/500) of south Vazhakulam Village. According to PW1, at the time of search, the accused alone was found there. MOs 1 to 6 were seized from there under Ext.P1 mahazar. He would further depose that sample was taken in a bottle having a capacity of 750 ml. from MO6 containing hot Wash and it was sealed

and labelled in accordance with the procedures. His personal seal of 'PKP' was affixed and thereupon on the label himself, the accused as also the witnesses put their signatures and thereafter, according to PW1, he arrested the appellant-accused under Ext.P3 memo and the factum of his arrest was duly communicated to PW2, the uncle of the accused as per Ext.P4. He would also depose that the balance Wash were destroyed. I may hasten to add that the said action from the part of PW1 in destroying the residue in its entirety cannot be said to be legal as a detecting officer is not authorised to destroy such residue and in fact, he has to bring such contraband articles before the authorised officer. I may also add that in the light of the decision of this Court in **Kittunni** v**. State** reported in **1981 KLT (SN) 169 (Case No.124)** only the authorised officer is having such a power. This Court took note of the provisions under section 67B of the Abkari Act and held that the Act did not provide any authority to the seizing officer to destroy any part of the Wash or other articles and going by Section 67B the seizing officer has to produce the materials before an authorised officer who can order confiscation. At the same time, it was held in the said decision that destruction of bulk of Wash seized by the seizing officer would amount to an irregularity. True that, in that case it was held that the petitioner therein could not establish before the court that the destruction of bulk of the Wash had prejudiced his defence and in such circumstances, it was held that irregularity committed by the seizing officer in destroying bulk of Wash could not affect legality of the trial or the conviction. Now, in this case, PW1 would depose that after the arrest he brought the appellant and the contraband articles to Excise Range Office, Perumbavoor and registered Crime No. 3 of 2001 of Perumbavoor Excise Range. Ext.P5 is the crime and occurrence report registered against the appellant for commission of offence under Section 55(g) of the Abkari Act. He would further depose that he himself prepared Ext.P2 search list and also Ext.P6 forwarding note. Though he would depose that the property list and the forwarding note were prepared on 9.5.2001 evidently, they reached the court only on 21.2.2002. PW1 would also depose that he had prepared the property list on the next day viz., 9.5.2001 and sent the Thondi articles on that day itself through the Court of Judicial First Class Magistrate, Permubavoor. The records would reveal that they reached the court only on 11.5.2001. He deposed that the contraband articles were under his safe custody till they were produced before the court and also that he had conducted the investigation initially. He questioned the attesting witnesses to the mahazar and recorded their statements and also questioned and recorded the statements of father of the appellant, Aakkattukudyveettil

Chathan. According to him, he obtained the records regarding the possession and ownership of the building in question from the Panchayath viz., Ext.P8 and produced it before the court and it is deposed that going by Ext.P8 the house in question belonged to the father of the accused-appellant. He would submit that the search memo was sent to the court as deploying anyone for that purpose would have reduced the required strength of the party to conduct the search. He further deposed to the effect that the same was proposed to be sent through post on the way and that the search memorandum was produced before the court. The evidence of PW1 would reveal that the witnesses are persons residing nearby the house in question and they were brought to the place of occurrence by him and his party. Though he deposed that forwarding note requiring to send the samples for chemical analysis was sent to the court on 9.5.2001 actually it reached the court on 11.5.2001. PW2 is the attesting witness to Ext.P1 mahazar. He turned hostile to the prosecution. He is none other than the uncle of the appellant/accused. Though he did not support the prosecution case regarding the search and seizure he admitted his signature in Ext.P1 mahazar. He would also depose that he went to the Excise Office on coming to know that Prasad was arrested and taken to Excise Range Office and then he was asked to sign on a paper. He would further depose that the contents of Ext.P1 mahazar were not read over to him and he put his signature without knowing its contents. PW3 is the Investigating Officer. Though PW3 is said to be the Investigating Officer he would depose that he had only verified the investigation conducted by PW1 and another K.T.George. It is not forthcoming as to what was the investigation conducted by said K.T.George and evidently, he was not examined as a witness. According to PW3, he completed the investigation by verifying the same and obtained chemical analysis report and laid the charge. He would admit that he had not verified the ration card of the owner of the building in question. He would depose that he did not think that it was a relevant document and that he did not enquire as to who are the persons residing in the said house. At the same time, he would depose that he had summoned the house owner and he could understand that the house was occupied by the owner of the building, his wife and children along with the accused. PW3 also deposed that he did not record the statement of PW2 and he did not question and record the statement of PW4, P.Y.Goerge. PW4 was the Assistant Excise Inspector then attached to the said Excise Range. The trial court found that the evidence of PW1 and PW4 which are corroborative to each other would reveal the seizure of MOs 1 to 6 from the house of the accused. At the time of the seizure the accused alone was there in the house going by the version of PW1 and PW4. The trial court found that their evidence would reveal that the contraband articles were being handled at the time of their search by the accused. Evidently, before the trial court, defence on behalf of the appellant was that though the alleged offence was detected on 8.5.2001 the forwarding note said to have been prepared on 9.5.2001 reached the court only on 24.5.2001. However, on a perusal of Ext.P6 it is evident that the said contention is bereft of any basis as the forwarding note dated 9.5.2001 reached the court on 11.5.2001 and from the court the sample for analysis along with the same was sent on 24.5.2001. Ext.P7 property list would reveal that the properties along with list reached the court on 11.5.2001. PW1 would depose that till it reached the court the contraband articles were in his possession. The trial court found that the delay of 3 days in sending the contraband articles as also the samples collected is not serious enough to adversely affect the case of the prosecution. The trial court found that the decision of this Court in **Narayani** v **Excise Inspector** reported in **2002 (3) KLT 725** is not applicable to the facts of the case and the delay of 3 days is not sufficient to throw the case of the prosecution. The trial court also found that non-examination of PWs 2 and 4 by the Investigating Officer viz., PW3 is also not material and it could not be said that owing to the failure on the part of PW3 in questioning and taking statements from them prejudice has been caused to the accused-appellant. It was held that PWs 1 and 4 conducted search and seized the contraband articles as per Ext.P1 and they had not deposed anything more than what is stated in Ext.P1. This cannot be true to facts in the light of the evidence of PW1 as PW1 himself would depose that he had conducted the investigation initially and questioned Kumaran, Gopalan and Chathan. Gopalan was later examined as PW2. His evidence would also reveal that PW1 questioned and recorded statements from Chathan, who is the father of the appellant and the owner of the house in question. True that, the evidence of PWs 1 and 4 are relevant in this case. PW3 is the Investigating Officer. According to him, as noticed hereinbefore, he had not conducted any investigation and he had only verified the investigation conducted by PW1 and another K.T.George. PW2, who is the attesting witness to Ext.P1 mahazar turned hostile to the prosecution. At the same time, it is evident that he would admit his signature in Ext.P1 mahazar. Evidently, he had deposed that he had not seen the search and seizure of the contraband articles from the house in question as also the arrest of the appellant-accused. There can be no legal bar in proving the prosecution case based only on the evidence of the official witnesses provided their evidence is trustworthy, that is, free from doubt or infirmity. The learned Public Prosecutor contended that no illegality or legal infirmity could be attributed to the impugned judgment and, therefore, the conviction as also the sentence imposed on the appellant for the conviction under Section 55(g) of the Abkari Act calls for no appellate interference.

6. The evidence of PWs 1 and 4 would reveal that on that day they were on patrol duty and when they reached Ezhippuram they obtained information regarding the distillation of arrack in the house of Aakkattukudyveettil Chathan. Before conducting a search, going by the normal procedure contemplated under Section 30 of the Abkari Act, a warrant is to be obtained from the Magistrate having the jurisdiction. A deviation is possible and permissible only in circumstances contemplated under section 31 of the Abkari Act. Going by section 31 Commissioner of Excise or any Abkari officer not below the rank of Excise Inspector or a Sub Inspector of Police or a Station House Officer if got reason to believe that an offence under Section 55(g) of the Abkari Act has been committed and delay in obtaining a search warrant under Section 30 would prevent execution thereof he could after recording his reason on the ground of his belief enter and search any place and also could seize anything found therein which he got reason to believe, to be liable for confiscation under this Act. Evidently, the appellant took up the

contention before the trial court that though PW1 claimed to have prepared a search memorandum it was not produced before the court. The oral testimony of PW1 would reveal that he produced the search memo in this case. Evidently, search was conducted by PW1 and at the relevant time he was the Excise Inspector attached to Excise Range Office, Perumbavoor. Therefore, there cannot be any doubt with respect to the position that he was competent to conduct search even without warrant provided the conditions under Section 31 are satisfied. Though he has deposed that he produced the search memorandum before the court the lower court records which reached this Court pursuant to an order to that effect, did not contain any such document. In that context, it is relevant to refer to the discussion in that regard by the trial court. Even after noting the specific contention raised by the appellant-accused that search memorandum was not produced before the court and also the earlier evidence of PW1 that he had prepared a search memorandum it is not stated therein that the said document was actually produced before the court. The trial court proceeded with the consideration of that aspect and found that even if, there is any such illegality in conducting the search the facts which were discovered during the search could be taken into consideration. In short, it was held by the trial court that such illegalities could not adversely affect the case of the prosecution. In this context, it is relevant to refer to Section 31 of the Abkari Act. Section 31 reads thus:-

> "**31**. **Power to certain abkari and police officers to search houses, etc. without warrant**.- Whenever the Commissioner of Excise or any abkari Officer not below such rank as may be specified by the Government in this behalf or any Police Officer not below the rank of Sub Inspector or a Police Station Officer, has reason to believe that an offence under this Act has been committed and that the delay occasioned by obtaining a search warrant under the preceding section will prevent the execution thereof, he may, after recording his reasons and the grounds of his belief at any time by day or night, enter and search any place and may seize anything found therein which he has reason to believe to be liable to confiscation under this Act, and may detain and search and, if he thinks proper, arrest any person found in such place whom he has reason to believe to be guilty of any offence under this Act".

A perusal of Section 31 would reveal that in order to conduct search of houses or search without warrant exercising the power under Section 31 of the Abkari Act the officer competent to conduct such search by virtue of the said provision, must have a reason to believe that an offence had been committed and any delay in obtaining search warrant under Section 30 of the Act would prevent the execution thereof and further he is bound to record his reason and ground for such belief before entering house and conducting the search and seizure. Evidently, in this case, search was conducted without obtaining warrant under Section 30 and in such circumstances evidently, the search was conducted by PW1 invoking the power under Section 31 of the Act. But, who passed the information and what was the information and what was the reason and the ground recorded by him for believing that an offence had been committed and that any delay in obtaining search warrant would prevent execution thereof are not forthcoming in this case. Evidently, the search memorandum claimed to have been prepared was legally brought on record as a document on the side of the prosecution. True that, while being examined as PW1 the detecting officer deposed that he prepared such a memorandum and that was supported by PW4. However, going by the provision, to conduct a search without a warrant, at the relevant point of time the competent Abkari officer must have reason to believe that an offence had been committed and the delay if occasioned in obtaining search warrant would prevent execution thereof. Going by the section before entering into the concerned premises and effecting the search the officer who is conducting the search has to record the reasons and grounds of his belief. There is absolute absence of any evidence by PW1 that he had recorded any reason in the search memorandum. It is in this context that the failure to legally bring on record the search memorandum, if at all it was prepared, has to be looked into. When a search without warrant could be effected only on forming such an opinion as mentioned hereinbefore and recording the reasons and grounds in the search memorandum the failure to produce search memorandum and got it marked would certainly be an illegality. Add to it, going by the evidence of PW1, after taking sample the rest of the wash was destroyed. Though, the case of the prosecution is that an information was received regarding the distillation of arrack in the house of Aakkattukudyveettil Chathan and despite the statement of the detecting officer as PW1 that he had questioned and recorded the statement of Aakkattukudyveettil Chathan who is not only the father of the appellant-accused but also the owner of the house in question, he was not examined on the side of the prosecution. It is also to be noted that though Ext.P8 ownership certificate in respect of the building in question was produced the Investigating Officer viz., PW3 deposed to the effect that he had not verified the same.

7. The discussion as above would reveal that PW1 had deviated from the mandatory requirement under Section 31 of the Abkari Act. As noticed hereinbefore, the appellant took up the specific contention that the search memorandum allegedly prepared by PW1 was not produced in court. The lower court records did not contain the same. At any rate, the prosecution had not brought the same legally on record. The trial court did not delve deep into the matter and found that if at all

there is any illegality in the matter of search it is not vital or fatal to adversely affect the case of the prosecution. Certain aspects have to be considered in this case to consider whether the said lapse on the part of the prosecution is fatal. There can be no doubt with respect to the position that under normal circumstances search could be effected only after obtaining warrant from the Magistrate concerned in terms of the provisions under Section 30 of the Abkari Act. Section 31 is virtually an exception to the same and on satisfaction of the circumstances and conditions provided under Section 31 a competent Abkari officer or Police officer can conduct a search of a house even without a warrant. For doing so, he should have a belief that an offence under the Abkari Act had been committed and that the delay in obtaining a search warrant in terms of the provisions under Section 30 would prevent the execution thereof. In such circumstances, he has to record the reason and the ground of his belief and then to have the search of the house in question without warrant. The evidence of PW1 would reveal that while he was conducting patrol duty on 8.5.2001 along with his party he obtained an information that distillation of arrack was being conducted in house No.VP-3/259 (Old No.6/500) of Vazhakkulam Panchayat. Ext.P8 would reveal that Aakkattukudyveettil Chathan is the owner of the said house and in fact, going by the case of the prosecution, he is the father of the appellant/accused herein. PW1, the detecting officer admittedly, conducted investigation and had recorded the statements of three persons including the said Aakkattukudyveettil Chathan and PW2. The investigating officer had not actually taken statement either from PW1 or from PW4 who are respectively the detecting officer and the Assistant Excise Inspector who accompanied PW1 as part of the investigation. Thus, it is evident that the information allegedly received was with respect to distillation of arrack being conducted in the house of the aforesaid Aakkattukudyveettil Chathan. True that PW1 and PW4 would depose that when they searched the house in question the appellant/accused alone was found there. If the house in question was that of the father of the appellant the mere presence of the appellant in that house cannot be a reason for coming to the conclusion of his culpability. In the context of the case it is relevant to refer to Section 55(g) of the Abkari Act. It reads thus:-

> "**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; or
>
> ....
>
> shall be punishable"

It is the case of the prosecution that the house in question belonged to the father of the appellant/accused and to show that prosecution has produced Ext.P8. At the same time, Ext.P8 would only reveal that the house in question belonged to one Chathan. The learned Public Prosecutor submitted that the evidence of PW2 who is the uncle of the appellant/accused would reveal that Aakkattukudyveettil Chathan is the father of the appellant/accused. Even then, no evidence was adduced to show that the appellant/accused was residing there and was having control over the articles found therein which is one of the conditions to attract the offence under Section 55(g) of the Abkari Act. In this context, it is relevant to note that even though the information allegedly passed on to PW1 while he was conducting the patrol duty was to the effect that distillation of arrack was conducted in the house of Aakkattukudyveettil Chathan and though he had questioned the said Aakkattukudyveettil Chathan and recorded his statement no reason whatsoever has been assigned for not implicating that person as an accused in this case. In this context, a decision of the Hon'ble Apex Court in **Ram Singh** v. **Central Bureau of Narcotics** **(AIR 2011 SC 2490)** has to be looked into. True that, that was a case under the NDPS Act and in that case a servant of a hotel was allegedly found in possession of contraband belonged to his master. It was held therein that unless it was proved that the same was left under the custody of the servant and that he had absolute control over that he could not be found guilty for having conscious possession of the same as one of the tests to ascertain conscious possession as also title is his control over the goods. In this context it is also to be noted that PW2 who is the attesting witness to Ext.P1 mahazar and Ext.P2 would depose that he had not seen seizure of the items included in Ext.P1 used for distillation of arrack from the house of the accused/appellant. PW1 as also PW3 would depose that they had not asked for the ration card issued to the father of the appellant-accused to verify and see whether the appellant-accused has been residing along with Aakkattukudyveettil Chathan in the house in question. As noticed hereinbefore, going by Section 31 of the Abkari Act only on satisfaction of the conditions provided thereunder a search in the house without warrant is possible and permissible and it is mandatory to record the reasons and grounds by the officer who is conducting such search. Despite the statement by PW1 to the effect that he prepared a search memorandum it was not legally brought on record. In this context, it is also to be noted that records called for in this case do not contain the search memorandum allegedly produced. In short, no evidence whatsoever was produced to show that before conducting search in the house in question reasons and grounds were recorded by the detention officer to satisfy the mandatory requirements under Section 31 of the Act. This assumes relevance in the context that even going by PW1 he obtained the information that distillation of arrack was conducted in the house of one Aakkattukudyveettil Chathan and that he himself would depose that the said Chathan was questioned and his statement was recorded. True that this by itself cannot be said to be fatal to fetch an acquittal for the appellant in the case on hand as the evidence of PW1 and PW4 was to the effect that from the house in question the appellant was arrested and during the search of the house the appellant was found preparing arrack using Wash. According to PW1, hot Wash having a quantity of 10 litres was found in an aluminium pot having a capacity of 15 litres was seized. But, at the same time, PW1 would depose that after its seizure 750 ml. hot wash was collected from it as sample and thereafter the residue was destroyed. Going by the provisions under Section 67B of the Act, any such material on seizure has to be produced before the authorized officer without any unreasonable delay by the detecting officer. In other words, the detecting officer got no authority to destroy the Wash without producing the same before the authorised officer. In the light of the decision in **Kittunni's** case the learned Public Prosecutor stated that even if it is taken that the detecting officer is not competent to destroy the Wash on seizure it can only be an irregularity. In this case, it is to be noted that the case of the prosecution is that when they conducted search of the house of Aakkattukudyveettil Chathan the appellant/accused alone was found therein and he was distilling arrack and 10 litres of hot Wash was found from there and further that sample was taken from the said hot Wash found there. The quantity of Wash thus found even according to the prosecution was only 10 litres. No reason whatsoever was shown by the prosecution as to why the same was not produced before the authorised officer and even after taking the sample why it was not produced before the court. This assumes relevance in this context that admittedly, there occurred a delay of three days in producing the sample before the court. True that PW1 deposed to the effect that immediately after the seizure it was sealed and labelled and thereafter it was in his possession till it was produced before the court. In a case of this nature it is incumbent on the part of the prosecution to prove that the sample collected was kept in safe custody and it reached the chemical analyst for analysis in a tamper proof condition. True that, in Ext.P9 report it is stated that the bottle reached the analyst in a tamper proof condition. But, at the same time, the failure to produce the residue and the failure to afford any explanation as to why hot Wash allegedly seized from the house of Aakkattukudyveettil Chathan was destroyed, that too, when PW1 was not competent to do so, were not explained. Coupled with such aspects another illegality that infected the case of the prosecution is also worthy to be noted. PW1 who detected the offence would depose that initially investigation was conducted by him. A scrutiny of the evidence would reveal that after detecting the distillation of arrack he had not only prepared the search list and the forwarding note, but also, continued the investigation and questioned the witnesses viz., PW2 and Aakkattukudyveettil Chathan to whom the house in question belonged as per Ext.P8 and also another person by name Kumaran. Though PW3 conducted the investigation thereafter and laid the final report he would depose that he had not recorded statements from PW1, PW4 and he had not questioned any other person allegedly questioned by PW1 including Aakkattukudyveettil Chathan and PW2. Thus, it is evident that even according to him, though it is stated by him that another person by name K.T.George had conducted the investigation nothing is discernible from the evidence on record as what was the investigation conducted by the said K.T.George. The records would reveal that the only action from the part of PW3 is that he laid the final report and at the same time it would reveal that the investigation was in fact, conducted in this case by the detecting officer himself. These aspects were not at all seriously taken into consideration by the trial court and it is evident from the judgment that the trial court observed that if at all there is illegality in the matter of search it could not be said to be fatal to the prosecution and what is to be taken into consideration is the facts discovered during the search. The trial court found that the production of MO1 to MO6 before the court and Ext.P9 report justified the version of PWs 1 and 4 and therefore, the case of the prosecution could not be thrown out on the ground of illegality. In this context, as noticed hereinbefore, it is noted that MOs 1 to 6 were allegedly seized from the house of one Aakkattukudyveettil Chathan. The hot Wash which was allegedly found in the house of the said Chathan at the time of search was admittedly not produced before the court and what was produced before the court was only the sample collected from the hot Wash allegedly seized and it was the said sample that was sent for chemical analysis which culminated in Ext.P9 report. The circumstances expatiated above would constrain me to hold that mere production of MOs 1 to 6 and Ext.P9 report were not sufficient to establish the culpability of the appellant herein conclusively. The circumstances specifically mentioned hereinbefore are sufficient to grant benefit of doubt to the appellant herein. In the light of the aforementioned lacuna from the part of the prosecution it can only be said that the prosecution has failed to establish the guilt of the appellant/accused for the offence under Section 55(g) of the Abkari Act conclusively. When such serious aspects were not given due weight by the trial court the consideration can only be said to be perverse and conviction entered against the appellant/accused as also the sentence imposed against him call for interference. In such circumstances, I am of the view that this is a fit case warranting appellate interference. Accordingly, the judgment in S.C.No.368 of 2003 is set aside. The appellant shall be set at liberty in case his detention is not required in connection with any other case. The bail bond will stand cancelled.

This Criminal Appeal is allowed as above.

Sd/-
C.T.RAVIKUMAR
Judge

TKS