

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 29TH DAY OF OCTOBER 2015/7TH KARTHIKA, 1937

CRL.A.No. 500 of 2006

AGAINST THE JUDGMENT IN SC 301/2005 of ADDITIONAL SESSIONS
COURT, THODUPUZHA DATED 20-02-2006

APPELLANT/ACCUSED:

VIJAYAN, S/O. BHASKARAN,
THEKKEKARA HOUSE, KURISUPARA KARA, ANAVIRATTY VILLAGE.

BY ADVS.SRI.P.VIJAYA BHANU
SRI.P.M.RAFIQ

RESPONDENT/COMPLAINANT:

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
29-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.500 OF 2006

Dated this the 29th day of October, 2015.

J U D G M E N T

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

2. The incident in this case occurred on 08.03.2003. PW5 Sub Inspector of Police, PW4 Head Constable and other police officers were on routine patrol duty on that day and when they reached a place called 'Peechadu', they got reliable information that the accused is conducting sale of arrack. PW5 prepared Ext.P7 search memo and sent it to court. When they reached the place, they saw the accused on the road behind his shop bearing three plastic bottles and a can. Seeing the Excise Officials, he tried to run away. He was chased and taken into

custody and the articles were examined. It was found to contain Indian Made Foreign Liquor. PW5 took four samples of 180ml each. According to PW5, he marked the bottles as A, B, C and the can as D and samples were numbered as A1, B1, C1 and D1. The arrest memo prepared by PW5 is Ext.P8 which contains the signature of independent witnesses, accused so also PW5. PW5 says that the four samples were sealed in the presence of the accused and the witnesses and labeled so also balance contraband articles. Then then returned to the Station along with the accused, thondi articles and the documents and registered Crime No.64/2003 as per Ext.P9 First Information Report. The articles so seized were produced before court as per Ext.P10 property list. PW5 prepared forwarding note which is marked as Ext.P11. He obtained the chemical analysis report as per Ext.P12 and conducted the investigation in the case. He recorded the statement of witnesses, completed the investigation and laid charge before court.

3. 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 which made over the case to Additional Sessions Court, Thodupuzha 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(a) of Abkari Act, to which, the accused pleaded not guilty and claimed to be tried. The prosecution therefore had PWs 1 to 6 examined and Exts.P1 to P12 marked. M.O.s 1 and 2 were got identified and marked.

4. 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.

5. 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.

6. On appreciation of the evidence in the case, mainly relying on the evidence of PWs 4 and 5 and the contemporaneous document namely, Ext.P1 and also the fact of prompt production

of accused before court, court below came to the conclusion that the prosecution has succeeded in establishing its case against the accused and found him guilty. The conviction and sentence as already mentioned followed.

7. Learned counsel appearing for the appellant assails the conviction and sentence on several grounds. It was pointed out that the evidence of PW5 shows that the labels found on M.O.s 1 and 2 in court are not original labels and only copy of labels. PW5 has also stated that he does not remember where the original of the labels are. Pointing out that even though detection was on 08.03.2003, articles as such were produced before court only on 12.03.2003, learned counsel contended that in that circumstance possibility of tampering with the articles cannot be ruled out. There is no guarantee that the contraband articles seized from the possession of the accused are the one produced before court. The claim made by PW5 that the articles were produced on 10.03.2003 cannot be true in the light of the endorsement of the court on Ext.P10. It is therefore contended that in the light of the decision in **Ramankutty** vs. **Excise**

Inspector, Chelannur Range (2013 (3) KHC 308), non explanation of delay is fatal and the accused is entitled to acquittal.

8. Learned Public Prosecutor, on the other hand, contended that it is true that there is some ambiguity in the evidence of PW5. But a perusal of Ext.P1 mahazar prepared at the spot and Exts.P2 and P3 would show that seal found on those documents are identical which means that seal found on the material objects produced before court are correct and in fact affixed at the time of seizure itself. Learned Public Prosecutor also pointed out that even though seized articles seems to have been produced only on 12.03.2003, it is significant to notice that Ext.P1 mahazar and Ext.P8 arrest memo were produced on the very next day itself i.e. on 09.03.2003. The fact that Ext.P1 was produced on the very next day guarantees that there could not have been any manipulation of document and that clearly shows that the incident has occurred as alleged. Learned Public Prosecutor contended that the court below has analysed the evidence in considerable detail and has come to the conclusion that the

offence has been made out, and there are no grounds made out to interfere with the said finding.

9. The evidence of detection of contraband article remains confined to the testimony of PWs 4 and 5. According to PW5, who is the detecting officer, while he was on patrol duty along with other officers, he received reliable information about the clandestine dealing of the accused and after preparing search memo and sent it to court, he proceeded to the place where the accused was carrying on his nefarious activities. Both PWs 4 and 5 say that while they were on the way to the place of occurrence, they happened to see the accused trying to escape with the contraband article through behind the back of the shop. They chased him and he was intercepted and the articles found in his possession were identified as Indian Made Foreign Liquor. PW5 speaks about having taken samples and also about sealing and labeling of the samples. He also says that the label affixed on the samples contained the signature of his, accused and the witnesses. Similar procedure was done in the case of M.O.s 1 and 2. PW5 then says about having prepared Ext.P1 mahazar at

the spot and also says about production of accused before court concerned on the very next day itself. In these respects, he gets sufficient support from the evidence of PW4. Ext.P1 mahazar prepared at the spot contains a vivid description of what had transpired at the spot and that corroborates the testimony of PWs 4 and 5. From the endorsement available on Ext.P1, it can be seen that Ext.P1 and also the accused were produced before court on the very next day itself i.e. on 09.03.2003. It is true that the records indicate that the seized articles were produced only on 12.03.2003. It is also true that in the decision relied on by the learned counsel for the appellant, delay has been considered to be fatal. But that was a case where there was nothing to show that the accused was produced on the next day so also documents in that case. That was a case where there was no proper explanation for the delay and there was non compliance of the statutory requirements to be followed at the time of arrest and also there was non disclosure of custodian of contraband articles during the delayed period. In the present case, there is sufficient evidence to show that accused was

produced along with Ext.P1 mahazar on the very next day itself. What is important is that Ext.P1 contains the sample seal used by PW5 for sealing the samples as well as the balance contraband articles.

10. In the light of the above evidence, the mere fact that the seized articles as such were produced only on 12.03.2003 does not have much of consequence. The production of Ext.P1 mahazar which contains the sample seal and the arrest memo and also the prompt production of accused rules out the possibility of tampering with the evidence and manipulating the records.

11. It is true that the independent witnesses have turned hostile. But, as rightly noticed by the court below, evidence furnished by PWs 4 and 5 would not suffer from any infirmity and their evidence corroborates to a considerable extent by the document furnished by the prosecution, more precise, Ext.P1 mahazar. The prompt production of accused, arrest memo and also Ext.P1 mahazar before court further strengthens the prosecution case.

12. Learned Public Prosecutor is justified in her submission that the court below has analysed the evidence in considerable detail and has found the seizure, sampling etc. to be in accordance with law. The infirmities pointed out by the learned counsel though may look attractive at the first blush, on a close scrutiny of the evidence, it can be found to be without any basis at all.

13. The matter does not end there. The question then arises is what is the offence committed by the accused. The accused has been found guilty of the offence under Section 55(a) of Abkari Act. Section 55(a) reads as follows:

“55. For illegal import, etc.-Whoever in contravention of this Act or of any rule or order made under this Act

(a) imports, exports, transports, transits or possesses liquor or any intoxicating drug...”

14. This Court had occasion to interpret the said provision and has held that it applies only to cases where there is imports, exports, transports, transits or possession of liquor etc. There is no such case for the prosecution in this case. Obviously, Section 55(a) cannot be attracted. Section 8(1) of the Act can

also have no application to the case since what is seized is Indian Made Foreign Liquor and not arrack. The question then arises is whether Section 58 of the Act can be attracted. That also cannot be attracted since the ingredients necessary to attract the said provision is also not available in the case on hand. In fact, these aspects were considered by a Division Bench of this Court in **Josekutty vs. State of Kerala** (2013 (1) KLT 434) wherein in paragraph 8, it was held as follows:

“The final report submitted shows that there is no allegation that the petitioner was in possession of the illicit liquor with the knowledge that it is illicit liquor. So also, none of the prosecution witnesses has a case that petitioner had the knowledge that he was holding a can containing illicit liquor. In such circumstances, possession of liquor with the knowledge that it is illicit liquor, cannot be assumed. Hence, in the absence of evidence, petitioner can only be convicted for the offence under S.63 of the Kerala Abkari Act. S.63 as it then stood, provides only the sentence of fine”.

15. What then left is only Section 63 of Abkari Act. Admittedly, possession was of Indian Made Foreign Liquor and it

has already been found that Sections 55(a) and 58 of the Act can have no application. The petitioner could be said to be in possession of contraband article without proper authority or in excess of the quantity that is permissible. Necessarily, conviction under Section 55(a) will have to be set aside.

In the result, this appeal is partly allowed. The conviction and sentence awarded by the court below for the offence under Section 55(a) of Abkari Act are set aside but accused is found guilty of the offence under Section 63 of Abkari Act and sentenced for imprisonment for the period during which he had already undergone custody during pre trial stage and sentenced to pay a fine of Rs.5,000/- in default of payment of which he shall suffer simple imprisonment for a period of three months.

Sd/-

P.BHAVADASAN
JUDGE

smp

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P.A to Judge.