

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 3RD DAY OF DECEMBER 2015/12TH AGRAHAYANA, 1937

CRL.A.No. 65 of 2009

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AGAINST THE JUDGMENT IN SC 439/2006 of ADDL. SESSIONS COURT  
(ADHOC)-II, KALPETTA DATED 07-11-2008

APPELLANT/ACCUSED:

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KRISHNANKUTTY, AGED 36 YEARS,  
S/O.VELLUCHETTY, CHEERAL, SULTHAN BATHERI,  
WAYANAD DISTRICT.

BY ADVS.SRI.PRAMOD KOCHUTHOMMEN.E.  
SRI.RAFFEEKH.K

RESPONDENT/COMPLAINANT:

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STATE OF KERALA, REPRESENTED BY PUBLIC  
PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY SMT.S. HYMA, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON  
03-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**P.BHAVADASAN, J.**

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**Crl. Appeal No.65 OF 2009**  
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**Dated this the 3<sup>rd</sup> day of December, 2015.**

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

The accused was prosecuted for the offence punishable under Sections 8(1) and (2) 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. The prosecution case is that on 17.12.2005, on getting information, PWs 1, 2 and others enquired into sale of illicit liquor at Kalloorvayal during patrolling duty. They stopped their vehicle at Kalloor junction and while they were walking along the road, they happened to see the accused standing in front of the house of one Jayachandran carrying a can. Seeing the Excise Officials it is stated that the accused became nervous and tried to run away. He was apprehended and though he tried to extricate himself, he

was overpowered by the Excise Officials. The can seized had a capacity of 10 liters and it was found to contain a blue liquid. By taste and smell, it was identified as arrack. According to prosecution, the accused revealed that he had bought it from somebody else for sale. The can was taken into custody and from the can, 200ml of arrack was taken as sample in a bottle having a capacity of 375 ml. It was sealed and labeled and the label was signed by PW1, witnesses and the accused. Ext.P2 mahazar was prepared at the spot. They returned to the station with the accused, contraband article and the records and as per Ext.P3 crime and occurrence report, registered Crime No.87/2005. Ext.P4 is the property list and Ext.P5 is the forwarding note.

3. PW5 took over investigation of the case. He prepared Ext.P6 scene mahazar, recorded statement of witnesses, obtained Ext.P7 chemical analysis report and laid final report before court.

4. 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, 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 Sections 8(1) and (2) of Abkari Act, to which, accused pleaded not guilty and claimed to be tried.

5. The prosecution therefore had PWs 1 to 5 examined and Exts.P1 to P7 marked. M.O.s 1 and 2 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. Moreover, he stated that he has nothing to do with the incident. He would say that while he was working in the field, a person by name Vijayan who had two cans with him, seeing the Excise Officers, threw down the can in his field and ran away. The Excise Officers took the appellant

into custody alleging that he was carrying the can found in his field.

7. Finding that the accused could not be acquitted under Section 232 Cr.P.C, he was asked to enter on his defence. He examined DW1 and had Exts.D1 to D4 marked.

8. On appreciation of the evidence in the case, court below found that the evidence of PWs 1 and 2 is so clinching and is supported by Ext.P2 mahazar and therefore there is no doubt regarding the prosecution version of the incident. Accordingly, the accused was found guilty. Conviction and sentence as already mentioned followed.

9. Assailing the conviction and sentence, learned counsel appearing for the appellant contended that Exts.D1 to D4 and the evidence of DW1 had not been properly considered by the court below and had it been done, it could be seen that the claim made by the appellant is true or at any rate, a reasonable doubt is created regarding the role of appellant in the incident. It is clear from the prosecution evidence itself that a person by name

Vijayan in fact apprehended for the very same offence and that would fortify the claim put forward by the appellant. Reference was made to the evidence of PWs 3 and 4 independent witnesses who are alleged to have attested the mahazar. Learned counsel pointed out that the prosecution has not been able to establish the case against the accused beyond reasonable doubt. According to the learned counsel, the conviction and sentence cannot stand.

10. Learned Public Prosecutor, on the other hand, contended that the evidence was glaring and clinching and there is no doubt left in the mind of court regarding the role of accused. It was pointed out that though the accused tried to escape, he was overpowered by the Excise Officials. Moreover, a glass was recovered from his pocket which would show that he was engaged in nefarious activities. The court below has considered all the aspects in detail and therefore no interference is called for.

11. After hearing both sides and also after going through

the records, the evidence of PWs 1 and 2 at the first blush, appear to be foolproof. However, the evidence of PWs 3 and 4 cannot be easily ignored. PWs 1 and 2 gave a uniform version regarding the incident. They say that while they were on patrol duty, they received an information that in the particular area illegal sale of arrack is going on. They proceeded to the spot and they say that they parked their vehicle little distance away from the house of Jayachandran and when they reached in front of his house, they happened to see the accused coming along with a can and he was apprehended. They speak about having taken sample, sealed and labeled the balance contraband article etc.

12. It is true that Ext.P2 mahazar is prepared promptly and the accused and articles were produced before court on the very next day itself. The sample sent for chemical analysis also shows the contents of ethyl alcohol. However, defence has examined DW1 and marked Exts.D1 to D4 which shows that from a nearest place, one Vijayan was apprehended for the very same offence.

13. It is here that the evidence of PW4 assumes

importance. He would say that he had occasion to see Vijayan coming along with two cans and throwing it to the field of accused and running away seeing the Excise Officials. He further would say in cross examination that Excise Officers, accusing the appellant of being the carrier of the can, arrested him and there was wide protest on the side of accused. This has to be read along with the admitted case of prosecution that at a little distance, Vijayan was apprehended by DW1 for the very same offence. PW3 also would say that he heard a commotion when getting out of field after work and when he went to the place, he found the accused protesting against the act of Excise Officers trying to implicate him.

14. It is seen from the prosecution evidence that there was gathering of people at the place and there was commotion. In the light of the evidence, a reasonable doubt is created in the mind of court regarding the actual incident. Though it may not be possible to say that the accused is altogether innocent, it is doubtful whether the incident has occurred as alleged by the

prosecution. If that be so, benefit of doubt shall go to the accused.

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

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P.A to Judge.