

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 12TH DAY OF NOVEMBER 2015/21ST KARTHIKA, 1937

CRL.A.No.72 of 2009

AGAINST THE JUDGMENT IN SC 846/2005 of ADDL.SESIONS COURT
FAST TRACK -II, PALAKKAD DATED 30-12-2008

APPELLANT/ACCUSED:

KARUPPAN ALIAS CHANDRAN, AGED 48 YEARS,
S/O.CHANGAN, NAIKKALTHODI VEEDU, CHERUKKODE DESOM,
VALLAPPUZHA VILLAGE, OTTAPPALAM TALUK,
PALAKKAD DISTRICT.

BY SRI.C.C.THOMAS (SENIOR ADVOCATE)
ADV.SRI.NIREESH MATHEW

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
12-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 72 of 2009

Dated this the 12th day of November, 2015.

JUDGMENT

The accused was prosecuted for the offence punishable under Section 55(g) of the Abkari Act. He was found guilty. He was therefore convicted and sentenced to undergo rigorous imprisonment for four years and to pay a fine of ₹1 lakh with a default clause of four months. Set off as per law was allowed.

2. The prosecution case in brief is that on 24.11.2002, while PW3 was working as the Preventive Officer at the Pattambi Range, he along with his team of officers, on receipt of information that wash was being kept in a particular place, set out to find out the truth. On reaching the spot, when they entered the forest, they happened to see the accused digging and then taking out a black can from a pit. Seeing the excise officials, he became nervous and tried to

escape. He was prevented from doing so and the Excise Officials found that the can had a capacity of 35 litres and it contained 30 litres of liquid. By taste and smell, they recognized the liquid as wash. Nearby, they found six other cans having the smell of wash. The accused was arrested. Ext.P2 is the arrest memo. P.W.3 then took a sample of 500 ml from the contraband articles in a bottle having a capacity of 750 ml and prepared mahazar at the spot itself which is marked as Ext.P1. P.W.3 says that sample seized was sealed and labelled at the place of incident itself. The label contained the signatures of the accused, the witnesses and P.W.3. Subsequently, P.W.3 and his team of officers along with the accused, the contraband articles and documents returned to the Station and registered crime as per Ext.P3 occurrence report. He prepared Ext.P5 property list and had the accused and articles produced before court on 24.11.2002 itself. He sent requisition to the court to sent the sample for chemical

examination and obtained Ext.P9 report. Investigation was conducted by P.W.5, who recorded statements of witnesses and had the scene plan prepared which is marked as Ext.P8. He completed investigation and laid charge before court.

3. The court, before which the final report was laid, took cognizance of the offence and finding the offence is exclusively triable by a Court of Sessions, committed the case to Sessions Court, Palakkad under Section 209 of Cr.P.C. after following the necessary procedures. The said court made over the case to Additional Sessions Court, Fast Track-II, Palakkad for trial and disposal.

4. The latter court, on receipt of records and on appearance of the accused before the said court, framed charge for the offence punishable under Section 55(g) of the Abkari Act.

5. To the charge the accused pleaded not guilty and claimed to be tried. The prosecution therefore had P.Ws.

1 to 5 examined and had Exts.P1 to P9 marked. M.O.1 was got identified and marked.

6. After the close of prosecution evidence, the 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. Relying on the evidence of P.Ws. 3 and 4 and the contemporaneous document, namely, the mahazar prepared at the spot and also impressed by the fact that the accused, the documents and the contraband articles were produced immediately before the court concerned, the trial court found the accused guilty. Conviction and sentence as already mentioned followed.

9. Assailing the conviction, the learned counsel appearing for the appellant pointed out that even going by the prosecution evidence, after taking the sample, the balance wash was destroyed at the spot itself. This is in contravention of Section 53A of the Abkari Act which has caused considerable prejudice to the accused. That alone is sufficient to vitiate the conviction. It was then contended that the evidence of P.W.3 is to the effect that though he had claimed that label was affixed on all the articles seized, label was found missing at the time of evidence. The learned counsel then drew attention of this Court to Ext.P9 Chemical Analysis report wherein it is said that “the seal on the packet were intact and found tallied with the sample seal provided”. The learned counsel for the appellant pointed out that the sample was taken in a bottle and there is no observation by the Chemical Analyst that the seal found on the bottle tallied with the sample seal forwarded. In the absence of any such

statement in the chemical Analysis Report, it could not be said that the sample which was subjected to analysis was the sample taken from the contraband article seized from the possession of the accused. Relying on the decision reported in Krishnan v. State (2015 (1) KHC 882), the learned counsel contended that want of specimen seal for comparison vitiates the proceedings. Relying on the decision reported in Ali v. State of Kerala (2001 (2) KLT 389), it is contended that in the facts and circumstances of the case, a reasonable doubt is created regarding the authenticity of the sample sent for analysis and if that be so, the benefit should go to the accused. The learned counsel for the appellant therefore contended that there has not been a proper appreciation of the evidence in the case and the conviction cannot stand.

10. The learned Public Prosecutor on the other hand contended that there is absolutely no merit in any of the contentions raised by the learned counsel for the appellant.

True, the learned Public Prosecutor conceded that on facts, it does not appear that Section 53(a) procedure has been followed. But there is nothing to show that by the destruction of the balance article at the place of incident itself, any prejudice has been caused to the petitioner which would vitiate the proceedings. As regards the sample, the learned Public Prosecutor pointed out that the sample was again packed from the court and seal was affixed from the court also. It is true that in Ext.P9, what is stated is only that the seal found on the packet tallied with the sample seal forwarded. But that does not mean that the Chemical Analyst had not compared the seal on the bottle when the packet was opened that the specimen seal. It is pointed out that in Ext.P7 forwarding note, two seals are shown; one that of the court and the other that of the Detecting Officer. It is also contended by the learned Public Prosecutor that it is significant to notice that even though the mahazar does not

show the seal used, the officer concerned has supplied specimen seal immediately after detection to the court. Therefore, there is no infirmity in any of the procedures carried on by the Detecting Officer or by the Chemical Analyst and the appeal is only to be dismissed.

11. Evidence regarding detection, sealing and sampling remain confined to the testimony of P.Ws. 3 and 4. Among them, P.W.3 is the detecting officer who is functioning as Preventive Officer at the relevant time. Both of them say about having come across the accused and when they approached him, they happened to see the pit containing a can of 13 litres capacity having liquid. Both of them say about the seizure of the same and the sampling done by P.W.3. The witnesses are uniform in their statement of what had transpired thereafter. P.W.3 seems to have arrested the accused, prepared arrest memo and also prepared Ext.P1 mahazar. He then speaks about having returned to the station

and registered crime as per Ext.P3 occurrence report.

12. P.W.4 was only a guard who had accompanied P.W.3. However, his version regarding the incident is the same as given by P.W.3. Even though these witnesses were cross-examined, nothing could be brought out to show that they were not speaking the truth. Regarding the seizure, there is consistent and cogent version given by P.Ws. 3 and 4. Again the contemporaneous document, namely, Ext.P1 prepared by P.W.3 gives a narration of what had transpired at the place of occurrence and detection thereafter. It is significant to notice that P.W.3 had sent the sample of the seal affixed in the sample bottle on the same day of the incident itself which is marked as Ext.P6. Further, the accused and the articles were properly produced before the court also. It was under the above circumstances that the court below was inclined to hold that the prosecution has succeeded in establishing the case against the accused.

13. Coming to the contention raised by the learned counsel for the appellant, first of which is the complaint regarding the applicability of Section 53A of the Abkari Act. The said Section reads as follows:

“53A. Disposal of seized liquor, intoxicating drugs or articles.– (1) Notwithstanding anything contained in this Act, the State Government may having regard to the nature of the liquor, intoxicating drug, or article, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant consideration, by notification in the official Gazette, specify such liquor, intoxicating drug or article which shall, as soon as may be after their seizure, be disposed of by the authorized officer referred to in section 67B, in such manner as the Government may, from time to time determine after following the procedure hereinafter specified.

(2) Where any such notified liquor, intoxicating drug, or, article has been seized under this Act, the authorized officer shall prepare an inventory of such liquor, intoxicating drug or article containing such details relating to their description, quality, quantity, mode of packing, marks, numbers of such other

identifying particulars of the liquor, intoxicating drug or article or the packing containers in which they are kept, place of origin and other particulars, as the authorized officer may consider relevant to identify the liquor, intoxicating drug or article in any proceedings under this Act and make an application to any Magistrate for the purpose of.–

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate photographs of such liquor, intoxicating drug or article and certifying such photographs as true; or

© Allowing to draw representative samples of such liquor, intoxicating drug or article in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section 2) the Magistrate shall, as soon as may be, allow the application.

(4) Where any liquor or intoxicating drug or article under this Act has been kept under the custody of any court in connection with any offence committed under this Act, before the commencement of the Abkari (Amendment) Ordinance, 2002 or has been brought

before a Magistrate without complying the procedure laid down in sub-section (2), the authorized officer shall obtain prior permission of the court or Magistrate before initiating proceedings under sub-section (2).

(5) Notwithstanding anything contained in the Indian Evidence Act 1872 (Central Act 1 of 1872) or the Code of Criminal Procedure, 1973 (Central Act 2 of 1974) any Court trying an offence under this Act, shall treat the inventory, the photographs of liquor, intoxicating drug or article and any list of samples drawn under sub sections (2) and (4) and certified by the Magistrate, as primary evidence in respect of such offence.

Explanation.- 'Article' for the purpose of this section includes jaggery and other like substances, the value of which depreciates in passage of time."

14. Admittedly in the case on hand, the procedure has not been followed. The question is whether that by itself is a ground to vitiate the conviction.

15. Section 53A only deals with the manner, method and procedure to be followed while destroying the articles, since it is felt that carrying the articles to the court or

to the police station would be only overburdening the police authorities and courts which lack sufficient space to keep it. Before destroying the contraband article seized, the authorised officer has to prepare an inventory and various other procedures have to be followed. But it cannot be treated as an illegality as no prejudice has been caused to the accused by the destruction of the balance contraband article at the place of incident itself. This contention has necessarily to fail.

16. True, in the decision reported in Krishnan v. State (2015(1) KHC 822) the court held as follows:

“P.W.3, the Investigating Officer, deposed before the Court that the seal used by P.W.1 was his personal seal and that seal was affixed on the Forwarding Note. But, such statement did not find a place in the statement given by P.W.1 to P.W.3. The explanation offered by P.W.3 was that he had omitted to note down that For the reasons already stated, it was impossible for P.W.1 to affix his personal seal on the Forwarding Note. Therefore, the deposition so given by P.W.3 before the court is considered in the light of the evidence given

by P.Ws. 1 and 2, the statement made by P.W.3 that P.W.1 stated to him that he had affixed his personal seal on the Forwarding Note was only an incorrect and baseless statement. In view of these facts, there is no assurance that the sample of the contraband allegedly seized by P.W.1 from the appellant had, in fact, reached the Chemical Examiner for analysis. Such an assurance is possible only when the sample of the seal affixed on the sample is provided to the Chemical Examiner for comparison. Such a light evidence is missing in this case. Therefore, there is no assurance that the Chemical Examiner examined really the sample taken from the bulk allegedly seized from the appellant in this case.”

Highlighting this aspect, learned counsel pointed out that going by Ext.P9, there is nothing to show that sample seal of the officer concerned has been forwarded to the chemical examiner for comparison. It is further emphasized that chemical examiner only says that seal found on the packet tallies with the specimen seal.

17. It would appear from a reading of the evidence that the court had packed the sample produced by P.W.3

before court and had affixed the seal on that packet also. One must remember here that P.W.3 had furnished his sample seal on the date of apprehension itself and the specimen seal of both the court and the officer concerned are available in Ext.P7 forwarding note. The mere fact that chemical examiner has only stated that comparison was made only on the seal on the packet does not mean that the officer has not verified the seal on the sample bottle. Obviously he must have done so. Here this is a case where the chemical examiner had also noticed the sample seal of the officer on the sample bottle, normally he would have compared the seal in that case also.

18. In the decision reported in *Ali v. State of Kerala* (2001(2) K.L.T. 389), it is held that when there is doubt regarding the authenticity of the sample sent to the laboratory, then the accused is entitled to benefit of doubt and he is entitled to acquittal. Pointing out the entries in Ext.P9 report, it is contended that there is no guarantee that the

sample reached the Laboratory is the sample taken at the place of occurrence as spoken to by P.W.3.

19. Though the argument may look attractive at the first blush, on a close scrutiny, it can be found to be without any basis whatsoever. P.Ws. 3 and 4 stated about the sampling done at the time of occurrence and further stated that the sample was produced before court on the very same day itself. The mere fact that Chemical Analyst did not specifically say about the label on the sample does not mean that there is no proper sampling or there has been tampering with the sample. This contention has only to fail.

20. The result is that the court below was perfectly justified in coming to the conclusion that the offence had been made out. No grounds are made out to interfere with the finding of the court below. The conviction has only to stand.

21. Faced with the above situation, learned counsel appearing for the appellant contended that the sentence

imposed is totally disproportionate to the offence committed by the accused and such a heavy sentence is not warranted. It is also pointed out that the appellant had no antecedent of having indulged in such activities and there is nothing to show that he was a habitual offender. Learned counsel pointed out that he may be given an opportunity to reform himself and that long time has elapsed since the detection of the crime and some leniency may be shown to the accused with regard to the sentence.

22. Under the circumstances, it cannot be said that the submission cannot be said to be without any merit. Quantity seized is small and also the fact that long time has been elapsed, it is only justifiable to take a lenient view with regard to the sentence.

23. Considering the above facts, there is some justification in the contention raised by the complainant that the sentence is on the high side.

While confirming the conviction of the accused for the offence under Section 55(g) of the Abkari Act, the sentence imposed by the trial court is set aside and the accused is sentenced to undergo simple imprisonment for three months and to pay fine of Rs.1,00,000/–, in default, to suffer simple imprisonment for one month. Set off as per law is allowed.

P. BHAVADASAN,
JUDGE

sb.