

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 28TH DAY OF OCTOBER 2015/6TH KARTHIKA, 1937

CRL.A.No. 78 of 2009 ()

**AGAINST THE JUDGMENT IN SC 403/2006 of ADDITIONAL SESSIONS COURT
(ADHOC-I) KASARAGODE DATED 16-12-2008**

**IN CP 94/2006 OF JUDICIAL FIRST CLASS MAGISTRATE COURT, KASARAGOD
DATED 04-08-2006**

APPELLANT(S)/ACCUSED:

**K.T.BALAKRISHNAN, S/O.K.KUMARAN,
NARAKKODUTHOTTY, PERALADUKAM, KOLATHUR VILLAGE.**

**BY ADVS.SRI.ALAN PAPALI
SRI.SOJAN MICHAEL**

RESPONDENT(S)/COMPLAINANT:

**STATE OF KERALA
(O.R.NO.2/2003 OF EXCISE RANGE, KASARAGODE)
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.**

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 28-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 78 of 2009

Dated this the 28th 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 the Abkari Act. He was found guilty. He was therefore convicted and sentenced to undergo simple imprisonment for a period of six months and to pay a fine of ₹1 lakh with a default clause of one month. Set off as per law was allowed.

2. The incident in this case occurred on 10.01.2003. PW1, the Preventive Officer attached to the Excise Circle Office, Kasaragod along with PW2, who was the Guard of Kasaragod Excise Range, were on patrol duty as usual. By about 5.30 p.m., when they reached the place called Choorikkod, they happened to see the accused coming along the road carrying a bag with him. Feeling suspicious, he was intercepted and the contents of the bag was examined. They recovered 48 packets from the bag. Each packet

having a capacity of 100 ml contained some liquid. On verification, it was found to contain arrack. One packet was opened for identification and the contents therein was tested by smell and taste and confirmed that it was arrack. Two other packets were opened and the contents therein were taken in a bottle as sample and the balance 45 packets were taken possession of. Both the sample and the balance seized articles were sealed and labelled as is required under law. The labels contained the signatures of the accused, witnesses and PW1. The accused was arrested as per Ext.P1 arrest memo. Ext.P2 is the seizure mahazar prepared by PW1. The accused, contraband articles and the records were produced before PW4 who took over possession of the articles and the custody of the accused. He prepared Ext.P3 occurrence report. He had the accused and the articles produced before court on 11.01.2003. He prepared Ext.P4 forwarding note. He produced the properties before court as per Ext.P5 property list. PW5 took over investigation. He

recorded statement of witnesses, prepared Ext.P6 mahazar, obtained Chemical Analysis report Ext.P7, 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 to be exclusively triable by a Court of Sessions, committed the case to Sessions Court, Kasaragod under Section 209 of Cr.P.C. after following the necessary procedures. The said court made over the case to Additional Sessions Court, (Ad hoc - II), Kasaragod, for trial and disposal.

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

5. To the charge the accused pleaded not guilty and claimed to be tried. The prosecution therefore had PWs 1 to 5 examined and had Exts.P1 to P8 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 he could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. He chose to adduce no evidence.

The court below impressed by the evidence of PWs 1 and 2 and also by the prompt production of articles before the court and also influenced by the narration in Ext.P2 seizure mahazar, came to the conclusion that the offence had been clearly made out in the case and accordingly, found the accused guilty. Conviction and sentence followed.

8. The main thrust of argument of the appellant is that the offence under Section 55(a) cannot be attracted to the facts of the case and therefore the prosecution has to fail. Further, it is contended that the sample sent for analysis is not the sample taken from court and there is some confusion regarding the sample which was forwarded

for analysis. The benefit of doubt should certainly go to the accused. It is also contended that there is no description of the seal in Ext.P2 mahazar and that is fatal to the prosecution. Accordingly, it is contended that the accused is entitled to an acquittal.

9. The learned Public Prosecutor on the other hand contended that the court below has found the evidence of PWs 1 and 2 to be above board and found that their evidence to be acceptable in the light of the narration in Ext.P2 seizure mahazar, which is a contemporaneous document. Accepting these items of evidence, the court below found the accused guilty and there are no grounds made out to interfere with the conviction and sentence. The learned Public Prosecutor on the other hand pointed out that even assuming Section 55(a) is not attracted, the offence under Section 8(1) is clearly made out and therefore, the claim for acquittal cannot stand.

10. On going through the records, it is felt that there is considerable force in the submission made by the learned Public Prosecutor. The evidence of PWs 1 and 2 clearly show that on 10.01.2003, PWs 1 and 2 had gone on routine patrol duty. By about 5.30 p.m., when they reached the place called Choorikkod, they happened to see the accused coming along the road carrying a bag with him. They both speak about the subsequent event that transpired at the spot namely, the interception of the accused, examination of the contents of the bag. Both of them say that the bag contained 48 packets of 100 ml each. PW1 claims that he opened one of the packets and by taste and smell he identified the liquid as arrack. He further says about the opening of three packets and taking the contents in a bottle as sample. Both PWs 1 and 2 say that sample and the balance contraband articles were sealed and labelled and the label contained the signatures of PW1, the accused and the witnesses.

11. It is significant to notice that the accused and the articles were produced before court on 11.01.2003. It is also significant to notice that in the cross examination of PW1, he speaks about the seal used by him. He admitted in cross examination that he has not shown the seal which was affixed by him on the sample and the rest of the contents in the mahazar. There is no suggestion to either PW1 or PW2 that they had any reason to falsely implicate the accused.

12. The fact that the independent witnesses have turned hostile and also have not supported the prosecution may not be a ground to throw the prosecution case. When the evidence of PWs 1 and 2 was found to be convincing enough and there is nothing to show that they had any reason to falsely implicate the accused, the court below was perfectly justified in accepting their evidence. Further, their evidence gets corroboration in the form of Ext.P2 seizure mahazar which contains the entire fact that transpired at the spot. The prompt production of the accused, the articles

and documents before court further fortifies the prosecution case.

13. True, Ext.P2 the mahazar does not show the seal said to have been affixed by PW1. But in his cross examination, he has clearly stated that the seal used by him contains the letter KVN. The forwarding note is marked as Ext.P4. In the column left for specimen seal is seen provided and it tallies with the narration given by PW1 in cross examination. There is nothing to show that there has been any infirmity in the sealing and labelling of the sample or the sealing and labelling of the rest of the contraband article seized from the possession of the accused.

14. It was contended that PW4 had prepared the forwarding note later and if that be so, it could not have contained the seal affixed by PW1 on the sample and the rest of contraband article packed and sealed.

15. Though the argument may look attractive at the first blush, there is no merit in it. There is no suggestion to

PW1 or PW4 to the effect that the seal shown in the forwarding note could have been the seal used by PW1. If the accused had such a case, it should have been put to the witnesses.

16. The court below has analysed the evidence in considerable detail and has come to the conclusion that there is no reason to suspect the prosecution case. On a re-appreciation of the evidence, this Court finds no grounds to take a different view.

17. However, as rightly pointed out the offence under Section 55(a) will not be attracted. That deals with a situation where there is a detection or possession during import or export. There is no such case for the prosecution in this case at all of any export or import so as to attract Section 55(a). However that does not mean that the accused is entitled to an acquittal. His act squarely falls within the ambit of Section 8(1) & (2) of the Abkari Act and he is liable to be convicted for the said offence.

18. In the result, while setting aside the conviction of the accused for the offence under Section 55(a) of the Abkari Act, he is found guilty of the offence punishable under Section 8(1) and (2) of the Abkari Act and the sentence awarded by the court below is retained.

This appeal is without merits and it is accordingly dismissed.

Sd/-
P.BHAVADASAN
JUDGE

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P.A. to Judge