

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 1ST DAY OF DECEMBER 2015/10TH AGRAHAYANA,
1937

CRL.A.No. 594 of 2006 ()

AGAINST THE JUDGMENT IN SC 670/2005 of III ADDITIONAL SESSIONS
COURT (ADHOC) FAST TRACK NO.I, THRISSUR.

APPELLANT(S)/ACCUSED:

MANI @ MANIKAN, AGED 38 YEARS,
S/O.CHATHAN, MUTHIYARKODE COLONY,
MUTHIARKODE DESOM,
KANNIYARKODE VILLAGE.

BY ADVS.SMT.DHANYA P.ASHOKAN
SRI.V.JOHN SEBASTIAN RALPH

RESPONDENT(S)/COMPLAINANT:

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

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
01-12-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 594 of 2006

Dated this the 1st day of December, 2015.

JUDGMENT

The accused was prosecuted for the offences punishable under Sections 55(a) of the Abkari Act and was found guilty. He was convicted for the offence under Section 58 of the Abkari Act and sentenced to undergo rigorous imprisonment for three years and to pay fine of Rs.1,00,000/-, in default, to undergo simple imprisonment for three months.

2. The incident which gave rise to this case occurred on 26.7.2003. P.W.1, the Preventive Officer attached to Pazhayannur Excise Range office, while on patrol duty, at about 5.30 p.m. on the said day when reached near the house of one Raman, happened to see the accused coming along the road with a can. He was intercepted and the can was seized and its contents were examined. The can had a capacity of 10 litres and it contained 9 litres of liquid. By

taste and smell, the liquor was identified as arrack. P.W.1 took sample of 180 ml from the same and sealed and labelled the sample, so did he with the balance contraband article also. He prepared Ext.P1 seizure mahazar. He thereafter along with accused, contraband article and the documents returned to the office and entrusted the same to the Excise Inspector.

3. P.W.4 was the Excise Inspector at the relevant time. P.W.4 says that by about 6.30 p.m. he received the articles, the accused and the documents from P.W.1. He registered Crime No. 13 of 2003 for offences under Sections 8 (1) and (2) of the Abkari Act as per Ext.P3 occurrence report. On the next day, the accused, the contraband article and the documents were produced before court. He sent a forwarding note to the court for sending the articles for chemical examination and he obtained Ext.P4 report. He recorded statements of witnesses and had Ext.P5 scene mahazar prepared. He completed investigation and laid charge before

court.

4. The court, before which final report was laid, took cognizance of the offences. Finding that the offences are exclusively triable by a court of Sessions, the said court committed the case to Sessions Court, Thrissur as per Section 209 Cr.P.C. after following the necessary procedures. The said court made over the case to Additional Sessions Court (Adhoc) Fast Track No.I, Thrissur for trial and disposal.

5. The latter court, on receipt of records and on appearance of the accused, framed charge for the offence punishable under Section 58 of the Abkari Act. To the charge, the accused pleaded not guilty and claimed to be tried. The prosecution therefore had P.Ws.1 to 4 examined and had Exts.P1 to P6 marked. M.O. 1 was got identified and marked. After the close of the 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. He has also filed a statement in which he had stated that he along with the people of the colony had organized a strike to have the toddy shop near Pampady closed and in order to wreak vengeance, the excise officials had falsely implicated him in the crime at the instance of the shop contractor.

6. Finding that the accused could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. Ext.D1 was marked from his side.

7. On appreciation of the evidence, the court below found that there is no evidence to show that the contraband article seized from the possession of the accused was proved to be arrack and therefore brought the act of the accused within the ambit of Section 58 of the Act and convicted and sentenced as already stated.

8. Assailing the conviction and sentence, learned counsel appearing for the appellant contended that after

having found that there is nothing to show that the contraband article alleged to have been seized from the possession of the accused is arrack, it was improper on the part of the court to conclude that the accused is guilty of the offence alleged against him. Learned counsel pointed out that final report was filed for offences punishable under Sections 8(1) and (2) of the Abkari Act and the court framed charge for the offence punishable under Section 58 of the Abkari Act. Learned counsel also contended that even assuming that Section 58 of the Abkari Act applies, mere possession is not sufficient as per the decision reported in Josekutty v. State of Kerala (2013(1) K.L.T. 434).

9. Learned counsel also contended that no forwarding note is seen marked in this case and no sample seal is made available for ensuring that the sample sent for chemical examination is the sample taken from the contraband article seized from the possession of the accused.

This is fatal to the prosecution and for the said proposition learned counsel relied on the decisions reported in Krishnan v. State (2015(2) K.L.T. SN 8) and Joseph v State of Kerala (2009 (4) KHC 537). It is therefore contended that conviction and sentence cannot stand.

10. Learned Public Prosecutor on the other hand attempted to sustain the conviction and sentence and pointed out that the evidence of P.Ws. 1 and 2 are convincing enough and their evidence is clear to the effect that the accused is in possession of the contraband article. It is pointed out that mere non-marking of the forwarding note does not mean that the sample sent for chemical examination is not the sample taken from the contraband seized from the possession of the accused. Further, it is contended that the court below has chosen to accept the evidence of P.Ws. 1 and 2 and there is no reason for this Court to take a different view.

11. After having heard learned counsel for the appellant and the learned Public Prosecutor, and after having perused the records, this Court feels that the appellant is entitled to succeed on both the grounds urged before this Court.

12. The definition of the word “arrack” shown in the Abkari Act is as follows:

“3(6A) “Arrack” means any potable liquor other than Toddy, Beer, Spirits of Wine, Wine, Indian made spirit, foreign liquor and any medicinal preparation containing alcohol manufactured according to a formula prescribed in a pharma-copoeia approved by the Government of India or the Government of Kerala, or manufactured according to a formula approved by the Government of Kerala in respect of patent and proprietary preparations or approved as a bonafide medicinal preparation by the Expert Committee appointed under Section 68A of the Act.”

The court below refused to accept the contention of the prosecution that the contraband article seized is arrack. The

court below felt that taste and smell was not sufficient to identify the contraband article as arrack. Though the prosecution had a case that the article is arrack, the court below found it as liquor and went on to take aid of Section 58 of the Abkari Act to convict the accused. Even assuming that it is liquor that the accused had carried, still Section 58 cannot be attracted to the facts of the case because the ingredients necessary to attract that provision has not been established.

13. Section 58 reads as follows:

“58. For possession of illicit liquor.– Whoever, without lawful authority, has in his possession any quantity of liquor or of any intoxicating drug, knowing the same to have been unlawfully imported, transported or manufactured, or knowing the duty, tax or rental payable under this Act not to have been paid therefor, shall be punishable with imprisonment for a term which may extend to ten years and with fine which shall not be less than rupees one lakh.”

14. Counsel appearing for the petitioner says that it involves mens rea to constitute an offence under Section 58

the Act. This aspect was considered in the decision reported in Josekutty v. State of Kerala (2013(1) K.L.T. 434) wherein 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.”

There is no case for the prosecution that any of the ingredients necessary to attract Section 58 of the Abkari Act is available in the case on hand. So the conviction and sentence under Section 58 of the Act cannot be sustained.

15. Equally formidable is the ground taken with regard to the non-marking of the forwarding note. Of course, P.W.4 says that he had prepared the forwarding note and sent

it to court. But for reasons best known to them, that had not been produced. There is nothing to show that the forwarding note contains the sample seal so as to ensure that the sample sent for chemical analysis is the sample taken from the contraband seized from the possession of the accused.

16. In the decision reported in *Krishnan v. State* (2015 (2) K.L.T. SN 8) it was held as follows:

“Ext.P5 is a copy of the Forwarding Note submitted before the court for sending sample for subjecting it to chemical analysis. A specific space is provided in the Forwarding Note for affixing the sample seal. No such sample seal was affixed on Ext.P5. Whether the sample seal was affixed on the original of Ext.P5 sent to the Chemical Examiner? Normally, if the sample seal is not appearing in the copy of the Forwarding Note, in this case it is Ext.P5, it has to be presumed that such sample seal was not affixed on the original Forwarding Note unless proved otherwise. A copy of the Forwarding Note is kept in the office of the court for serving certain purposes. The purposes are evidence from the contents of the form of the Forwarding Note itself. They include

the quantity and description of the sample drawn from the bulk of the contraband, the details of the case and the space for providing the sample impression of the seal affixed on the sample taken from the bulk of the contraband. Therefore, as already stated, the absence of sample seal in the space provided in the copy of the Forwarding Note. Is sufficient reason for presuming that the sample seal is not provided in the original Forwarding Note. Of course, this is only a rebuttable presumption. In the case on hand, such presumption has not been rebutted by the prosecution.”

17. In the decision reported in Joseph v State of Kerala (2009(4) KHC 537), it was observed as follows:

“18. Yet another infirmity in the prosecution case is that there is no request forwarding note either produced or marked to indicate that a request was made to the Magistrate to send the sample bottle to the chemical examiner for analysis. P.W.6 who conducted the investigation, has no case that he had made any such request or had filed any forwarding note. Likewise, P.W.1 also has no case that he had made a request to the Magistrate to send the sample bottle to the chemical examiner. Ext.P4 certificate of chemical analysis dated

24.11.1997 is relied on by the prosecution to show that the sample bottle was duly despatched to the chemical examiner for analysis. In the absence of any forwarding note or requisition, it is not explained as to how the Magistrate forwarded a sample bottle to the chemical examiner as per his covering letter dated 19.8.1997 referred to in Ext.P4 certificate. Even the office copy of the covering letter has not been produced. The thondi section clerk who was the custodian of the properties before the Magistrate, was not examined to prove matters such as the date of receipt of the property before the Magistrate, the condition in which those properties were received in court including the fact whether a sample bottle was received and if so, whether the seals if any on such bottle were in tact, the date of despatch of the sample to the chemical examiner and the nature of the custody of the sample bottle until then. The prosecution can succeed in securing a conviction against the appellant only if it is shown that the sample which was subjected to chemical analysis as evidenced by Ext.P4 certificate was the very same sample which was drawn from the bulk quantity of contraband liquor allegedly held by the accused and which after change of hands, eventually reached the hands of the chemical examiner.”

18. On a reading of the above decisions, it can be seen that there is some significance and importance attached to the forwarding note. It is not an empty formality. On this ground also, it is felt that the appellant is entitled to succeed.

For the above reasons, this appeal is allowed, the conviction and sentence passed by the trial court are set aside and it is held that the prosecution has not succeeded in proving the guilt of the accused beyond reasonable doubt. The accused is acquitted of the charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

P. BHAVADASAN,
JUDGE

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