

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 2ND DAY OF DECEMBER 2015/11TH AGRAHAYANA, 1937

CRL.A.No.854 of 2006

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AGAINST THE JUDGMENT IN SC 291/2004 of ADDL.SESIONS COURT  
(ADHOC)-II, THODUPUZHA DATED 03-04-2006

APPELLANT/ACCUSED:

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VARGHESE @ BABY,  
S/O.PONNUS, POIKAYIL HOUSE, VAGAMON VILLAGE,  
KAPPIPATHAL KARA.

BY ADVS.SRI.M.P.MADHAVANKUTTY  
SRI.GOKUL DAS V.V.H.

RESPONDENT/COMPLAINANT:

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

BY SMT. LILLY LESLIE, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON  
02-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**P.BHAVADASAN, J.**

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**Crl. Appeal No.854 OF 2006**  
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**Dated this the 2<sup>nd</sup> day of December, 2015.**

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

The accused faced prosecution for the offence punishable under Section 55(a) 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 three months.

2. The facts absolutely necessary for the disposal of this appeal are as follows:

PW2, at the relevant time, was functioning as Sub Inspector of Police of Upputhara Police Station. On 08.06.1997, while he along with three others had set out for routine patrol duty, he got reliable information that behind the property of one Baby who runs a tea shop, accused is engaged in sale of brandy. They reached the place. PW2 went behind building No.7/44 and from among the plantations, he was able to recover a card board box containing 17 bottles each of 375 ml capacity containing brandy.

One of the bottles were opened and the contents were identified by taste and smell. Two samples were taken from 11 bottles and the samples were sealed and labeled and so also rest of the contraband articles. Ext.P1 is the mahazar prepared by PW2. He returned to the station with the accused, contraband articles and documents and registered crime No.92/97 as per Ext.P3 First Information Report. He claims to have filed forwarding note and obtained Ext.P5 chemical analysis report. He 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. The said court made over the case to Additional Sessions Court (Adhoc)-II, Thodupuzha for trial and disposal. The latter court, on receipt of records and on appearance of accused, framed charge for the offence under Section 55(a) of Abkari Act. The accused pleaded not guilty to the charge and claimed to be tried.

4. The prosecution therefore had PWs 1 and 2 examined

and Exts.P1 to P5 marked. M.O.s 1 and 2 were got identified and marked.

5. After the close of the prosecution evidence, accused was questioned under Section 313 Cr.P.C wherein he denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent.

6. 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.

7. Probably, convinced by the evidence of PW2 taken along with Ext.P1, court below was inclined to hold that the prosecution has succeeded in establishing the case against the accused and find him guilty. The conviction and sentence as already mentioned followed.

8. Assailing the conviction and sentence, learned counsel appearing for the appellant contended that even going by the prosecution case, on getting prior intimation that PW2 had gone to the spot for detection. There is no whisper from PW2 that he had prepared the search memo and sent it to court before

conducting search. Relying on the decision in **K.L. Subhayya vs. State of Karnataka** (1979 KHC 754), it was contended that the necessity to file search memo and get appropriate order is not an empty formality and its non compliance is fatal. If there is any failure to comply with the said procedure, that is bad in law. Learned counsel then pointed out that the forwarding note said to have been filed by PW2 is not seen produced in the case and there is no evidence of sample seal said to have been used by PW2. According to the learned counsel, going by the decisions in **Majeedkutty vs. Excise Inspector** (2015 (1) KLT 624) and in **Krishnan vs. State** (2015 (2) KLT SN 8), non production of forwarding note and absence of specimen seal in the forwarding note are fatal to prosecution. Finally it is contended that there is no evidence at all to show that building No.7/44 and the property from where the articles were seized belongs to the accused. These crucial aspects have been conveniently omitted to be noticed by the court below and that has resulted in a wrong decision being entered into.

9. Learned Public Prosecutor relied on the evidence of PW2

to sustain the conviction. It is pointed out that the evidence of PW2 is without blemish and that is sufficient in law. At any rate, according to the learned Public Prosecutor, the court below has found the evidence sufficient enough and unless it is shown that the findings of the court below are perverse, this Court exercising its appellate power may not interfere. It is pointed out that this Court may not be justified in interfering with the findings of the court below unless there are compelling reasons.

10. As rightly pointed out by the learned counsel for the appellant, it is on prior intimation that PW2 had proceeded to the spot. Certainly, in such cases, search memo has to be prepared and sent to court. Even assuming that order of court as such is not possible, a communication has to be sent immediately. There is no whisper about that by PW2. In the light of the decision relied on by the learned counsel for the appellant, the search becomes illegal. The other contentions raised by the learned counsel for appellant also need consideration for it can be said that evidence collected during an illegal search can be used.

11. In the decisions in **Majeedkutty vs. Excise Inspector**

(2015 (1) KLT 624) and in **Krishnan** vs. **State** (2015 (2) KLT SN 8), it has been held that production of forwarding note and affixing sample seal thereon is not an empty formality. That, probably, is the only guarantee which the court and the accused has regarding the fact that sample sent for analysis is the sample taken from the contraband seized from the possession of accused. It is a vital piece of evidence. It is significant to notice that the form of forwarding note contains a column for that purpose. Therefore, it cannot be treated as an empty formality. Had there been a sample seal in the mahazar prepared by PW2, that is sufficient. But that too is not available. Therefore, there is no guarantee that the sample sent for chemical analysis is the sample taken from the contraband seized from the possession of accused.

12. Equally formidable is the third ground raised for consideration. It is elementary that the prosecution is bound to prove that the house and the property from where the contraband has been seized belongs to the accused. The interesting aspect is that PW2, investigating officer, who is the

detecting officer, says that though he had applied to the concerned local authority, he did not receive any reply regarding the ownership of the property. Result is that there is no evidence to show that plot No.7/44 and the property from contraband is alleged to have been seized belongs to the accused. Merely because PW2 says that he has seized the contraband article and has taken sample etc. will not be sufficient in law in the light of the above findings.

13. For the above reasons, this Court is unable to sustain the conviction and sentence passed by the court below.

In the result, this appeal is allowed. The conviction and sentence passed by the court below for the offence under Section 55(a) of Abkari Act 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