

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. 858 of 2006

AGAINST THE JUDGMENT IN SC 544/2001 of ADDL.SESIONS COURT FOR
TRIAL OF ABKARI ACT CASES, NEYYATTINKARA DATED 04-04-2006

APPELLANT/ACCUSED:

RAVI, S/O. CHINNA THAMPI,
PERIYAVILA VEEDU, AYINKAMOM DESOM, PARASSALA VILLAGE.

BY ADV. SRI.R.T.PRADEEP

RESPONDENT/COMPLAINANT:

THE STATE OF KERALA, REPRESENTED BY THE
DIRECTOR GENERAL OF PROSECUTION,
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.

Crl. Appeal No.858 OF 2006

Dated this the 2nd day of December, 2015.

J U D G M E N T

The accused was prosecuted for the offence punishable under Section 58 of Abkari Act. He was found guilty and was therefore convicted and sentenced to suffer rigorous imprisonment for two years and to pay a fine of Rs.1 lakh with default clause of rigorous imprisonment for three months. Set off as per law was allowed.

2. The facts in brief are as follows:

On 22.03.1998, PW3, the Sub Inspector of Police of Parassala Police Station along with other officers was conducting patrol duty and when they reached a channel near Thettiyodu, they found a person with a black can in his hand and a glass in other hand standing near the channel. Seeing the Police, he tried to escape. That was effectively prevented and the can in his possession was seized. It contained about 8 liters of arrack. He was arrested at 7 p.m and the can was sealed. Ext.P1 is the

mahazar prepared at the spot. PW3 returned to the station along with the accused, seized articles and documents and registered Crime No.142/1998 as per Ext.P2 First Information Report. The accused was produced before court and Ext.P3 is the remand report. Ext.P4 is the property list. PW3 filed requisition for forwarding the sample for chemical analysis and obtained chemical analysis report Ext.P5. A good part of the investigation was conducted by him. However, final report was laid by CW6.

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, Thiruvananthapuram. The said court made over the case to Additional Sessions Court for trial of Abkari Act cases, Neyyattinkara for trial and disposal. The latter court, on receipt of records and on appearance of accused, framed charge for the offence under Section 58 of Abkari Act. To the charge, accused pleaded not guilty and claimed to be tried.

4. The prosecution therefore had PWs 1 to 4 examined and Exts.P1 to P6 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. 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. The court below, impressed by the evidence of PWs 2 and 3 and also the fact that Ext.P1 seizure mahazar contains all the details, was inclined to hold that the prosecution has succeeded in establishing the case against the accused. Therefore, he was found guilty and conviction and sentence as already mentioned followed.

8. Sri.R.T. Pradeep, learned counsel appearing for the appellant, contended that the court below has overlooked certain vital aspects which would go against the prosecution case and would go in favour of the accused. Learned counsel pointed out that there is no evidence regarding proper sampling as such even

though PW4, thondi clerk, was examined in this regard. It is also contended that forwarding note is not seen marked in the case. Relying on the decision in **Majeedkutty vs. Excise Inspector** (2015 (1) KLT 624) it is contended that non production of forwarding note is fatal to the prosecution case.

9. Learned Public Prosecutor, on the other hand, contended that the evidence of PWs 2 and 3 are sufficient to find the accused guilty and detection is properly proved through them. The contemporaneous document namely, Ext.P1 narrates the entire details and therefore there is no reason to upset the findings of the court below.

10. It is not sufficient in law if search and seizure alone are proved. The prosecution must prove that the article found in possession of accused is contraband article. For the said purpose, certain facts will have to be established. It is no doubt true that the evidence of PWs 2 and 3 are uniform and consistent regarding the fact that accused was found standing on the road with a can and glass and he was apprehended by the police. It may also be said that the contents of can was arrack and the

accused was arrested and the contraband was sealed. What is significant is that neither PW2 nor PW3 says that any sample was taken from the spot and sample was sealed and labeled from the place. Neither a reading of the evidence of PWs 2 and 3 nor perusal of Ext.P1 threw any light in this regard. It seems that no sample was taken from the spot.

11. PW4 is the Clerk of the Judicial First Class Magistrate court concerned. She claims to have taken samples as per the orders of the court. She is definite that the endorsement to that effect is available in Ext.P6. Even though PW4 would say that she had acted under the orders of the court, no such order is produced. There is no evidence to show that she is authorized to take sample. Even though she claimed that there is relevant entry in Ext.P6, a reading of Ext.P6 shows that there is no order as such passed by the learned Magistrate authorising PW4 to take sample. Result is that there is considerable confusion regarding the person who has taken sample and the place from where the sample was taken.

12. Apart from the above fact, it is seen that no forwarding

note containing specimen of sample seal is marked in the case. Therefore, there is no guarantee that the sample which reached the laboratory is the sample taken from the contraband seized from the possession of accused. In the decisions in **Majeedkutty vs. Excise Inspector** (2015 (1) KLT 624) and in **Krishnan vs. State** (2015 (2) KLT SN 8), the necessity of producing forwarding note and also the necessity to indicate specimen of sample seal has been emphasised. A comparison of the seal found on sample is the only possible way for the court to ensure that the article sent for analysis is the article seized from the possession of accused. It, therefore, could not be said that the filing of forwarding note and sample seal is only an empty formality. These two vital aspects have been omitted to be noticed by the court below and that vitiates the conviction and sentence.

13. For the above reasons, this Court is unable to uphold the finding of the court below that the prosecution has succeeded in establishing the case against the accused.

In the result, 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.