

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 16TH DAY OF SEPTEMBER 2015/25TH BHADRA,
1937

CRL.A.No. 433 of 2007 ()

AGAINST THE JUDGMENT IN SC 461/2006 of ADDITIONAL DISTRICT
AND SESSIONS COURT FAST TRACK (ADHOC-III), NORTH PARAVUR.

APPELLANT(S)/ACCUSED:

VIJAYAN, 55 YEARS, S/O.KOCHAYYAPPAN,
VADAKKE MANAPPURATHU VEEDU,
CHERIYAPALLAMTHURUTH,
PARAVUR VILLAGE, PARAVUR TALUK.

BY ADV. SRI.P.T.SEBASTIAN TOMY

RESPONDENT(S)/COMPLAINANT:

THE STATE OF KERALA, THROUGH
THE EXCISE INSPECTOR, VARAPUZHA EXICSE RANGE,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SMT. S. HYMA.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
16-09-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 433 of 2007

Dated this the 16th day of September, 2015.

JUDGMENT

The appellant was prosecuted for the offence punishable under Section 55(a) of the Abkari Act. He was found guilty and convicted and sentenced to undergo rigorous imprisonment for one year and to pay fine of Rs.1,00,000/-, in default, to undergo rigorous imprisonment for three months. Set off as per law was allowed.

2. The prosecution case in brief is that on 7.5.2004 at about 9.20 a.m. while P.W.1 and his team of officers were doing patrol duty in Paravur town, they happened to see the accused standing in the waiting shed in front of Paravur Town Hall. He had a big shopper with him. He was approached by P.W.1 and enquiry was made regarding the contents in the big shopper. The big shopper was opened and examined. It was found to contain 10 bottles of 750 ml

each Indian Made Foreign Liquor by name 'XO XXX Rum'. All the bottles contained the stickers of KSBC. P.W.1 opened one of the bottles and by taste and smell realized that it was Indian Made Foreign Liquor. After convincing the witnesses present there, accused was arrested. Ext.P1 is the arrest memo. Due intimation of the arrest was given by Ext.P2. From the bottle which he opened, he made a sample of 200 ml. in a bottle having the capacity of 375 mls., sealed it and had the labels affixed on it. He did not take samples from other bottles as those bottles were similar in kind and nature to the bottle from which he had taken the sample. The sample taken bottle and the rest of the bottles along with the big shopper were seized by P.W.1 and he prepared Ext.P3 mahazar. P.W.1 ensured that in all the material objects and in the sample, labels were affixed containing the signature of P.W.1, the accused and the witnesses. P.W.1, along with the articles had the accused produced before the Range Officer. He registered

crime as per Ext.P4 occurrence report. On the same day itself, he produced the accused before the Judicial Magistrate of First Class Court, Paravur. On intimation from the Assistant Commissioner of Excise, Excise Range Inspector attached to Varapuzha conducted investigation. He had the statements of witnesses recorded and further investigation was done by the Excise Inspector. P.W.6 took over further investigation, prepared Ext.P6 scene mahazar, statements of other witnesses were recorded, obtained Ext.P8 chemical analysis report and laid final charge before court.

3. The court before which the final report was laid took cognizance of the offence and finding that the offence is exclusively triable by a court of Sessions, committed the case to Sessions Court, Ernakulam. The said court made over the case to Additional District and Sessions Court (Adhoc-III), North Paravur for trial and disposal.

4. The latter court, on appearance of the accused and on receipt of records, framed charge for the offence punishable under Section 55(a) 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 6 examined and had Exts.P1 to P8 marked. M.Os. 1 to 3 were 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 would also say that he was not in the habit of either drinking liquor or carrying liquor. 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.

5. Finding that the prosecution evidence is sufficient, the court below entered a finding that the prosecution has established the case and conviction and

sentence as already mentioned followed. The said conviction and sentence are assailed in this appeal.

6. The conviction and sentence are challenged on the ground that P.W.1 failed to take sample from all the bottles and that vitiates the whole proceedings. It is contended that at the relevant time a person could carry three litres of IMFL. Each bottle which P.W.1 seized found to contain 750 mls. of liquor. The prosecution had to show that the accused had in possession of excess quantity. Samples from all the bottles ought to have been taken and sent it for chemical analysis. In the absence of that exercise, it could not be said that the accused was having excess quantity of liquor with him. It is further contended that there is no independent witness to the seizure spoken to by P.W.1 and in the absence of corroborative evidence the court below was not justified in finding the accused guilty. In support of his contention that sample should have been taken from each bottle, learned

counsel relied on the decision reported in Krishnankutty v. State of Kerala (2005(3) K.L.T. 568).

7. Learned Public Prosecutor on the other hand pointed out that the decision reported in Krishnankutty v. State of Kerala (2005(3) K.L.T. 568) is no longer good law in view of the decisions reported in Chandran v. State of Kerala (2008(2) K.L.T. 513) and Kelukutty v. State of Kerala (2009(4) K.L.T. 286). In those decisions, it has been specifically held that the detecting officer has to collect sample from one of the bottles when the rest of the bottles are of similar in nature and similar label is affixed. It is not necessary to take sample from each of the bottles. Therefore, the said contention cannot stand.

8. Regarding the second contention urged, even if the two independent witnesses turned hostile, it does not mean that the prosecution case has to fail. If the court concerned is impressed with the evidence of the officer who

detected the crime and feels that it is without blemish and beyond doubt, there is no reason as to why his evidence should not be accepted and conviction based on the same. The court below, according to the learned Public Prosecutor, considered the case in considerable detail and analysed the evidence and came to the conclusion that the accused is guilty of the offence alleged against him. Therefore, it is contended that no interference is called for with the conviction and sentence passed by the court below.

9. P.W.1 is the detecting officer. He deposed about the incident. According to him, on the date of incident, while he and his colleagues were on patrol duty, they happened to locate the accused in the waiting shed near Paravur Town Hall carrying a big shopper. Feeling suspicious of the contents thereof, he was approached and on inspection of the big shopper, it was found to contain contraband article. It contained 10 bottles of IMFL with the label already made

mention of. P.W.1 speaks to have taken sample in accordance with law from one of the bottles and he had taken care to specifically mention that the other bottles are similar to the bottle from which he had taken the sample and therefore, he did not feel it necessary to take sample from each of the bottles. He speaks about having arrested the accused and prepared the arrest memo. Ext.P3 is the mahazar prepared by him. He then speaks about having returned to the office and registered crime as per Ext.P4.

10. P.W.2 is a witness who is alleged to have seen the incident. But unfortunately for the prosecution, he turned hostile and denied his signature in Ext.P1 but admitted his signature in M.O.2. He also deposed that he has signed on M.O.2 label by the side of the road. P.W.3 is the other independent witness whom the prosecution examined to prove the incident. He too betrayed the prosecution. He, however, admits his signature on Ext.P1 and the M.Os. and would say

that he signed on the label while standing on the road running in front of Karippa Nursing Home. He denied having seen the actual seizure. P.W.4 is the Village Officer who prepared the site plan. P.Ws. 5 and 6 are the investigating officers.

11. The prosecution case therefore solely rest on the testimony of P.W.1, the Excise Officer, who detected the offence. The court below meticulously analysed his evidence and came to the conclusion that there is no reason to discard his evidence. This Court after going through the evidence of P.W.1 found no reason to doubt the version given by him in evidence. There is no suggestion to P.W.1 that he had any axe to grind against the accused or any other motive to falsely implicate the accused. Therefore, the evidence of P.W.1 is sufficient to show that the incident as alleged has occurred.

12. Corroboration for the evidence of P.W.1, if any required, is given by Ext.P3 the seizure mahazar. It contains all the details and also contains the signature of the accused

and the witnesses. Though the witnesses turned hostile, they have admitted their signatures on the labels and the M.Os. It is also significant to notice that the seized article and the accused were produced before the court on the same day. There is no delay in that regard and that further fortifies the claim made by P.W.1.

13. As regards the contention based on the decision reported in Krishnankutty v. State of Kerala (2005(3) K.L.T. 568) is without any basis at all in the light of the subsequent decisions, namely, Chandran v. State of Kerala (2008(2) K.L.T. 513) and Kelukutty v. State of Kerala (2009(4) K.L.T. 286). True in the decision cited by the learned counsel for the appellant, it is stated that in order to establish that the accused possessed large quantity of contraband article, sample from each of the bottles had to be taken. However, the said issue came up for consideration in the decision reported in Chandran v. State of Kerala (2008(2) K.L.T. 513)

wherein it was held as follows:

“5. Here what was seized was the branded labeled quantity of liquor. Merely because a suggestion that other bottles contained some other liquid, a different view need not be taken. All the bottles were labeled sealed bottles which are branded products of a known company commonly available in market. Facts of this case are similar to the facts in the decision in *Vijendrajit Ayodhya Prasad Goel v. State of Bombay* (AIR 1953 SC 247) and it cannot be stated that the other bottles seized contained some other liquid. There is no explanation or suggestion that other bottles contained some other liquid. In the judgment dated 16th July, 2007 in Criminal Appeal No. 1674 of 2003, one of us (Koshy, J.) held as follows:

“It is contended that samples of all bottles alleged to be liquor were not sent for sampling and it is not proved that entire bottles contained liquor. All the bottles were sealed and labelled and random samples were sent for examination. Therefore, there is no reason to say that other bottles were filled with different liquids other than the one contained in the bottle sent for examination. Appellant had no such case before the police or trial Court. The Indian made foreign liquor of

large quantity was seized in which A1 was driving the lorry and we see no ground to interfere in the conviction under S.55(a).”

Only the sample from one bottle need be taken and we are of the view that on the facts of this case, it cannot be stated that the other bottles contained different liquids so that it requires separate analysis of each bottle. Whether the samples from all the alleged contraband articles which are seized should be tested or not will depend upon the facts and circumstances of each case. We are of the opinion that principles laid down in Krishnankutty’s case (supra) cannot be accepted as laying down a universal principle that if several similar bottles containing similar liquids are seized, samples of contents of all bottles have to be examined, and that only the article in the bottles which are checked can be taken into account. If labelled sealed bottles containing the same substance are seized, checking of sample from one bottle will be enough to confirm the value of the articles in all the bottles. Similarly if large number of similarly labelled bottles purported to contain same type of article are seized, chemical examination can be done by taking one bottle or certain number of bottles selected at random. There cannot be any sweeping

generalization. Each case must be judged on its own facts by taking into account admissible evidence.”

14. Following the said decision, in the decision reported in *Kelukutty v. State of Kerala* (2009(4) K.L.T. 286) this court held that when the bottles are of identical and contains identical labels, it is not necessary for the detecting officer to take sample from all the bottles. It is sufficient if sample is drawn from one of the bottles. If that be so, the contention based on the infirmity in the taking of samples has to fail.

15. However, the matter does not end there. The question still remains as to what is the offence, if any, committed by the accused. The court below has found that the offence under Section 55(a) of the Abkari Act is attracted. On going through the Section and going through the decisions rendered with reference to that Section, it is virtually impossible to say that the said Section had any application to

the facts of the case. Probably one would say that Section 58 of the Act could have been attracted. It is also not there. If one brings it under Section 58 of the Act, then the necessary ingredients of Section 58 of the Act have to be satisfied. In fact an issue of the similar nature was considered in the decision reported in Josekutty v. State of Kerala (2013(1) K.L.T. 434). There the allegation was of a similar nature and therein it was held as follows:

“8. 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. S. 63 as it then stood, provides only the sentence of fine.”

16. Applying the principle laid down in the said decision, at worst what the accused could have done is the offence which falls within the ambit of Section 63 of the Act.

Thus while holding that the accused is in possession of contraband article, the conviction and sentence awarded for the offence punishable under Section 55(a) of the Act is set aside and it is held that the accused is guilty of the offence punishable under Section 63 of the Act. Therefore, he is convicted and sentenced to pay fine of Rs.5,000/–, in default of payment of which to suffer simple imprisonment for three months. The appeal is thus partly allowed.

P. BHAVADASAN,
JUDGE

sb.