

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 3RD DAY OF DECEMBER 2015/12TH AGRAHAYANA, 1937

CRL.A.No. 932 of 2006 ()

AGAINST THE JUDGMENT IN SC 146/2005 of ADDITIONAL SESSIONS COURT (ADHOC-I), KASARAGOD

IN CP 145/2004 OF JUDICIAL FIRST CLASS MAGISTRATE -II, HOSDRUG

APPELLANT(S)/ACCUSED::

**V.J. THOMAS @ KUNHIKUNHU,
AGED 34/04, S/O. JOSEPH, PATTOLIYIL
CHAVARAGIRI, PALAVAYAL VILLAGE, KASARAGOD DISTRICT.**

**BY ADVS.SRI.M.SANTHOSHKUMAR
SRI.K.P.HARISH**

RESPONDENT(S)/COMPLAINANT::

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

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 03-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 932 of 2006

Dated this the 03rd day of December, 2015

J U D G M E N T

Having found that the accused has committed the offence punishable under Section 55(g) of the Abkari Act, he was convicted and sentenced to undergo rigorous imprisonment for three months and to pay a fine of ₹1 lakh with a default clause of rigour imprisonment for a further period of one month.

2. The prosecution case against the accused is that on 18.11.2002, he was found in possession of the contraband article which was seized by PW4, who was then functioning as the Sub Inspector of Police of Chittarikkal Police Station. To be more precise, while the Police officers and his colleague officers were routine patrol duty, when they stopped at a place called, Chavaragiri, they received reliable information that the accused is engaged in manufacture of liquor. They reached near the house of the

accused and parked their jeep a little distance away from the house and then began to walk from their place to the house along with two independent witnesses. From the shed near the house of the accused, PW4 happened to see the accused carrying a can having a capacity of 35 litres from one place to another. On seeing the Police Officers, he toppled the can and tried to empty it. He tried to escape from the place. He was apprehended and the can was retrieved. On retrieving the can, it was found to contain 35 litres of wash. Two samples were taken from the can in two bottles of 750ml capacity and the samples were sealed and labelled. The labels contained the signatures of the accused, PW4 and the witnesses. PW4 prepared Ext.P1 mahazar at the spot and then, after preparing a search memo and sending it to the court, they conducted a search of the house of the accused. Nothing could be recovered from the house. They returned to the Police Station and registered Crime No. 256/2002 as per Ext.P4 FIR. Property

list was prepared which is Ext.P5 and the accused along with remand report was produced before court. PW4 claims to have sent a forwarding note namely, Ext.P6 to have the sample sent for chemical examination. The Chemical Analysis Report is Ext.P7. PW7 took over investigation and he drew up Ext.P9 scene mahazar. He recorded statements of witnesses and completed investigation. Pw6, who is the successor in office of PW4, laid the final report.

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, (Adhoc-I), Kasaragod, for trial and disposal.

4. The latter court, on receipt of records and appearance of the accused before the said court, framed charge for the offence punishable under Section 55(g) 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 7 examined and had Exts.P1 to P11 marked. MO1 was got identified and 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. He also claimed that he was falsely implicated at the behest of some person who were inimically disputes towards him.

7. 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.

8. The court below, convinced by the evidence of PWs 1 and 4 taken along with Ext.P1 mahazar and also the Chemical Analysis Report, was satisfied that the contraband article seized was wash intended to be used for the

manufacture of illicit liquor and therefore, found the accused guilty. Conviction and sentence as already mentioned followed.

9. Assailing the conviction and sentence, learned counsel for the appellant pointed out that Ext.P1 mahazar does not show that the sample was sealed, even though PWs 1 and 4 would say otherwise at the time of examination. According to the learned counsel, Ext.P1 being a contemporaneous document has to be given due consideration and it has to be taken that the samples are not sealed. Further, the learned counsel invited the attention of the this Court to the Chemical Analysis Report namely, Ext.P7 and pointed out that though the two samples were taken from the same pot, as per the analysis, the percentage of ethyl alcohol found in two samples are entirely different. This could not have been so, had the samples tested in the laboratory were the same which has taken by PWs 1 and 4 at the time of incident. A reasonable

suspicion is created regarding the samples that were subjected to analysis and if that be so, the benefit of doubt should go to the accused.

10. The learned Public Prosecutor pointed out that the evidence of PWs 1 and 4 are clinching enough and sufficient to show that the accused was seen shifting 35 litres capacity can from one place to another, when he happened to see the Police Officer. The fact that he tried to drain out the contents of the can shows his complicity. Further, it is pointed out that there is nothing brought out in the cross examination of PWs 1 and 4 to show that they had any axe to grind against the accused and had a reason to falsely implicate him. At any rate, the learned Public Prosecutor pointed out that lower court has accepted the evidence of PWs 1 and 4 and there is no reason as to why this Court should hold otherwise.

11. Probably, the learned Public Prosecutor is correct in her submission that going by the evidence of PWs 1 and 4,

it could be said that wash was recovered from the possession of the accused. The fact that he was seen shifting the can from one place to another and the further fact that seeing the Police Officers, he tried to drain out the contents shows to a great extent his complicity in the matter. The fact remains whether the contraband article seized is wash and whether it is intended to be used for the manufacture of illicit arrack.

12. PWs 1 and 4 do say about sampling and labelling of the samples. The accused and the properties were produced on the next day of apprehension. There is prompt action from the side of the Police Officers.

13. However, one unexplained fact which creates doubt in the mind of the court. As already stated, two samples were taken from the same contraband article. Surprisingly enough, the Chemical Analysis Report shows difference in the percentage of alcohol between the two samples. It is inconceivable as to how it could have

happened except for the fact that the two samples analysed are of two different types and it could not have been from same pot. Unfortunately for the prosecution, neither in the mahazar nor in the sample sent, it is specifically numbered as item 'A' and 'B'. Going by the prosecution case, the samples were taken from the same pot. If that be so there could not have been difference in the content of ethyl alcohol between the two samples. The considerable difference in the percentage of ethyl alcohol in the two samples does create a reasonable doubt in the mind of the court as to whether the samples sent were the samples actually taken from the contraband seized from the possession of the accused. If that be so, the benefit of doubt should certainly go to the accused.

14. Added to this is the fact that even though the accused was found to be in possession of wash, search of the shed near the house did not yield anything to show that he was engaged in the manufacture of illicit liquor. May be

that wash could be used only for that purpose. But the burden is on the prosecution to show that he was actually engaged in manufacture of liquor or that he was abetting the same. There is no evidence in that regard also.

For the above two reasons, this Court is unable to uphold the conviction and sentence. This appeal is allowed. The conviction and sentence passed by the court below are set aside and the accused stands acquitted of all charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

Sd/-
P.BHAVADASAN
JUDGE

ds

//True copy//

P.A. to Judge