

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

TUESDAY, THE 26TH DAY OF MAY 2015/5TH JYAISHTA, 193720

CRL.A.No. 791 of 2005 ()

**AGAINST THE JUDGMENT IN SC 197/2002 of ADDL.SESIONS COURT
FAST TRACT (ADHOC-II), KOZHIKODE DATED 05-05-2005**

APPELLANT(S):

- 1. BIJU, S/O.VASU,
MUKKIYAPARAMBATH,
NARIPPETTA ROAD, NADAPURAM
VATAKARA.**
- 2. SHAJI, S/O.KUNHIRAMAN,
POOLAKANDY,
KUNNUMMAL AMSOM, KAKKATTIL.**

BY ADV. SRI.T.G.RAJENDRAN

RESPONDENT(S):

- 1. THE SUB INSPECTOR OF POLICE,
NADAPURAM.**
- 2. STATE OF KERALA, REP. BY
PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.**

R1 & R2 BY PUBLIC PROSECUTOR SRI.GITHESH R.

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 26-05-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

STK

P.D. RAJAN, J.

Crl.A. No.791 of 2005

Dated this the 26th day of May, 2015

JUDGMENT

This appeal arises out of the Judgment in S.C.197/2002 of Additional District and Sessions Judge Fast Track (Adhoc II), Kozhikode in which the accused was convicted under Section 55(a) of the Abkari Act and sentenced to undergo rigorous imprisonment for 1½ years and pay a fine of Rupees one lakh, in default of payment of fine, simple imprisonment for 3 months.

2. The prosecution allegation was that on 21.03.2000 at about 21.45 hours appellants were found transporting 57 bottles of Indian made foreign liquor in a vehicle KL-11C- 4631 at Avolam Road Junction on Peringathur-Nadapuram public road. The contraband articles were seized by the Sub Inspector of Police, Nadapuram and a crime No.117/2000 was registered against them. The contraband articles and the accused were subsequently produced before Judicial First Class Magistrate, Nadapuram. After investigation, charge was

laid before court, from there, it was committed to Sessions Court Kozhikode.

3. To prove the allegation, prosecution examined PW1 to PW4 as occurrence witnesses and marked Ext. P1 to P10 and admitted MO1 to MO5 in evidence. The incriminating circumstances brought out in evidence were denied by them while questioning under Section 313 Cr.P.C. They were also heard under Section 232 Cr.P.C. Appellant examined DW1 in support of their defence contention. The trial court after sifting and weighing the evidence on record convicted the accused.

4. The learned counsel appearing for the appellant contended that there was no sampling as per law. The method in which the sample was taken is not narrated in the seizure mahazar or in any other documents. As per the seizure mahazar, 57 bottles were seized from the place of occurrence. It is the primary responsibility of the detecting officer to take sample from the place of occurrence itself and obtain signature of the independent witness and the accused in the sample and seal it and

produce before court. A mentioning in Ext.P8 itself is not sufficient to prove that there was proper sampling. When there is no sampling, no credibility in the seizure.

5. An Abkari Officer may arrest any person without warrant, if he is found committing an offence punishable under Abkari Act in a public place or thoroughfare and he has the power to seize and detain any liquor, intoxicating materials, utensils and implements for which he has reason to believe an offence has been committed. PW1, the detecting officer deposed that on 21.03.2000 at 21.45 hours, while he was conducting patrolling duty with the police party, he noticed one auto rickshaw KL-11C-4631 proceeding through the road at a high speed. Upon suspicion, he intercepted the vehicle and inspected it and found a passenger in the back seat. On inspection PW1 realised that it was prohibited foreign liquor in the State of Kerala and permission of sale is only granted in Mahi. He seized 57 bottles of foreign liquor after preparing Ext.P2 mahazar. The accused were arrested as per Ext.P1 arrest memo. PW1 stated that he took one bottle as sample

from each lot, 180 ml., 375 ml., 180 ml and 180 ml. But it was not stated in Ext.P2 that he sealed the samples and the balance liquor at the place of occurrence itself. In Ext.P4, it is specifically stated that sampling was done at the police station. But he has not produced the sample seal and specimen signature before court for verification. This creates a genuine doubt in the credibility of sampling in the seizure mahazar.

6. The learned Public Prosecutor contended that one sample bottle from each lot was taken from the seized article from the place of occurrence itself and sealed, which was described in Ext.P8 chemical examination report. In Ext.P4 FIR, the method of sampling was also stated. It was also mentioned that proper sampling was also done. There is no reason to disbelieve the evidence of the detecting officer. Therefore, a presumption under Section 114(e) of the Evidence Act will automatically apply in this case.

7. The seizure was made on 21.03.2000 at 21.45 hrs. The seized properties were produced before court on

23.03.2000 which was returned to the SHO for interim safe custody, since no space to keep the article safely. The seizing officer has not mentioned about the nature of seal of the balance foreign liquor after taking sample. In Ext.P4 also no mention about the nature and condition of the contraband articles, whether they are sealed bottles of similar brands. He took one bottle as sample and sealed at the place of occurrence and labelled it. Ext.P3 is the inspection memo. Subsequently he registered Ext.P4 FIR. They were also produced before court as per Ext.P5 remand report. P6 is the property list and Ext.P.7 is the forwarding note prepared by him for sending it for chemical examination. Ext.P.8 is the chemical examination result. The balance bottle after taking samples were marked as MO1 - MO4 series. The polithene bags were marked as MO5 series. After completing investigation he laid charge before court. PW3 is the auto rickshaw driver who attested Ext. P2 mahazar. He did not support the case. PW4 conducted the investigation and prepared P.10 mahazar. PW2 is another Police Constable

in patrol party who supported the seizure. The officers in charge of Police Stations shall take charge of and keep in safe custody pending the orders of a Magistrate or an Abkari Inspector, all articles seized under this Act which may be delivered to them and shall allow any Abkari Officer who may accompany such articles to the Police Station or who may be deputed for the purpose by his superior officer, to affix his seal to such articles and to take samples of and from them. All samples so taken shall also be sealed with the seal of the officer in charge of the Police Station.

8. In general, sample of foreign liquor is a limited quantity of foreign liquor which is intended to be similar to and represent a larger amount of the seized foreign liquor. An act of obtaining sample is called sampling which can be done by a responsible competent person. Samples of liquor can be taken for testing analysis, inspection, investigation, demonstration or trial use. The procedure for taking the sample was not mentioned in P2 seizure mahazar. The seized articles were not sealed at the place

of occurrence itself. The sample packet was not found sealed at the place of occurrence. In Ext.P2 the procedures are not mentioned. When the sample was taken from the place of occurrence in a foolproof manner, PW1 has to record that procedure in Ext.P2 mahazar. Subsequently, sample was produced before court and forwarded for the chemical examiner's laboratory for report. It was recorded in Ext.P8 that in sample, the seal was intact but that was not mentioned in Ext.P2 or in Ext.P4. There are two versions with regard to taking sample, i.e. sampling was done at the place of occurrence and another was that it was done at the Police Station. It is the primary responsibility of the prosecution to take sample and seal the packet and ensure that the seal has not been tampered with. Moreover, prosecution has a duty to prove that it was the sample taken from the contraband article seized from the accused which reached at the chemical examiner's lab in a foolproof condition.

9. In **Ravi V. State of Kerala (2011 (3) KLT 353)**, it was held that:

“The prosecution, in a case of this nature can succeed only if it is shown that the contraband liquor which was allegedly seized from the accused ultimately reached the hands of the Chemical Examiner by change of hands in a tamper proof condition. (Vide State of Rajasthan V. Daulath Ram (AIR 1980 SC 1314) and Valsala V. State of Kerala (1993 (2) KLT 550 (SC). No conviction can be entered against the accused in a prosecution as the present one unless it is proved that the sample which was analyzed in the Chemical Examiner's laboratory was the very same sample drawn from the contraband liquor allegedly found in the possession of the accused (See Sathi V. State of Kerala (2007 (1) KLT SN 57 (C.No.82) and Sasidharan V. State of Kerala (2007 (1) KLT 720). There is no satisfactory link evidence to show that it was the same bottles seized from the appellant which eventually found their way into the hands of the Chemical Examiner and that there was no meddling or tampering with the bottles while they were in the custody of PW4. Hence, the result of Ext.P7 Chemical Analysis cannot be applied against the appellant.”

10. In the light of the above discussion, I am of the opinion that taking sample and sealing is not an empty formality, and making any infirmities by the detecting officer is a serious one, which affect the credibility of the prosecution case. Ext. P2 mahazar itself is not sufficient

for a conviction. The property list also did not disclose that it was properly sealed at the place of occurrence from where it was seized. From the aforesaid discussion, there is no connecting evidence to show that the contraband articles sent to chemical examiner's laboratory was one and the same from where it was seized. The trial court failed to appreciate that vital aspect of the sampling and sealing, accordingly the conviction under Section 55(a) of the Abkari Act is liable to be set aside.

Hence, I set aside the conviction under Section 55 (a) of the Abkari Act and appellants are acquitted thereunder and set at liberty and this appeal is allowed.

Sd/-

**P.D. RAJAN,
JUDGE**

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P.A. TO JUDGE