

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 10TH DAY OF SEPTEMBER 2015/19TH BHADRA, 1937

CRL.A.No.996 of 2006 (A)

AGAINST THE JUDGMENT IN SC 304/2002 of ADDL. SESSIONS COURT
(ADHOC-III), KASARAGODE DATED 17.05.2006

APPELLANTS/ACCUSED:

1. ABDUL KHADER HARIS, S/O.ABOOBACKER,
MASJID BAZAR, KALLADKA, BANTWAL TALUK.
2. A.K.GOVINDAN, S/O.KONGAN,
PULIKKUNNUBAYAL, SIRAMES ROAD, KASARAGODE.

BY ADV. SRI.T.G.RAJENDRAN

RESPONDENTS/COMPLAINANT/STATE:

1. S.I. OF POLICE, MANJESHWAR.
2. STATE, REP: BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY SRI.C.K. JAYAKUMAR, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
10-09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.996 OF 2006

Dated this the 10th day of September, 2015.

J U D G M E N T

Three persons were prosecuted for the offence punishable under Section 55(a) of Abkari Act. The accused Nos.1 and 2 were found guilty and they were convicted and sentenced to suffer simple imprisonment for four years and to pay a fine of Rs.1 lakh with default clause of simple imprisonment for six months each.

2. PW3 along with PW4 were on patrol duty on 03.10.2001. At about 19.30 hours, while they were going along the National Highway, they happened to see a Maruthi Car bearing registration No.KA.21.M.2629 coming in the opposite direction. Though they were given signal to stop the vehicle, the car did not stop. The car was chased and was intercepted near a junction. There were three persons in the car. Two of them tried to open the front door and run away. However, they were prevented from doing so. According to PW3, there were 28 cardboard boxes kept in the

rear side and in the dicky and two cannas also. In 13 cardboard boxes, there were 12 bottles each containing 750ml of foreign liquor and there were 156 bottles in all the cardboard boxes. Balance 15 cardboard boxes contained 375ml of 24 bottles and there were a total of 360 bottles. The two cannas were seen to contain 35 litres and in that 70 litres of spirit were seen. The accused were arrested after preparing Exts.P2 to P4 arrest memos. He claims to have prepared Ext.P5 mahazar. He took one sample each from the two sets and also from the spirit which found in the vehicle. All the sample bottles were sealed and labels were affixed. They returned to the Police Station with the articles and the accused and registered a crime as Crime No.288/2001 as per Ext.P6 First Information Report. He sent the property list and the forwarding note to the court which are Exts.P7 and P8. The chemical analysis report received is Ext.P9. PW5 conducted investigation, recorded statement of witnesses and laid charge before court.

3. Judicial First Class Magistrate Court, Kasaragod took cognizance of the offence and on finding that the offence is exclusively triable by a Court of Sessions, committed the case to

Sessions Court, Kasaragod under Section 209 Cr.P.C. The said court made over the case to Additional Sessions Court (Adhoc) III, Kasaragod for trial and disposal. On receipt of records and on appearance of the accused, charge was framed for the offence under Section 55(a) of Abkari Act. The third accused was found absconding and the case against him was re-numbered as S.C.No.615/2003. To the charge, accused pleaded not guilty and claimed to be tried. The prosecution therefore had PWs 1 to 5 examined and Exts.P1 to P9 marked. M.O.s 1 to 4 were got identified and marked.

4. The court below, accepting the evidence of PWs 3 and 4 and also relying on the chemical analysis report found the accused guilty and overruling the objections raised relying on the decision in **Krishnankutty vs. State of Kerala** (2005 (3) KLT 568), convicted the accused who were present before court and sentence followed.

5. Assailing the conviction and sentence, Sri.T.G. Rajendran, learned counsel appearing for the appellant contended that there is no guarantee in this case at all to show that the articles produced before court were the articles seized at

the time of occurrence. It is also pointed out by the learned counsel that neither Ext.P5 nor the evidence of PW3, detecting officer, show that after taking residue by PW3 and labelled, signatures of the accused were obtained. Even regarding the samples taken by PW3, there is no case that he had affixed necessary labels. Further learned counsel contended that even going by the evidence of PW3, only one sample each were taken from the contraband articles which is not sufficient. Learned counsel pointed out that from each set of boxes, detecting officer was obliged to take two samples which he has not done. This is in violation of law. It is further pointed out that when the articles were produced before court, several of the bottles were found empty and the prosecution had no explanation for the same. Practically, there was no investigation at all and simply a few documents have been produced before court to fasten liability on the accused. Learned counsel contended that there has not been consideration of materials in the proper perspective and evidence has not been properly appreciated. Unless the prosecution establishes the identity of the articles to show that the articles produced before court are the articles seized at the time of

occurrence, prosecution will not succeed. Going by the property list produced before court which though says contained two pages, there is only one page before court and that does not show that all the properties seized from the place of occurrence were produced before court. Learned counsel went on to point out that the evidence of PW3 and the mahazar prepared by him are totally insufficient to establish the identity of the articles seized. Therefore, it is contended that the conviction and sentence cannot stand.

6. It is true that PWs 3 and 4 had given a uniform version about the incident. They say that while they were on patrol duty, they happened to see a Maruthi Car coming on the opposite side and it was intercepted and contraband articles were seized.

7. PW3 is the detecting officer. He speaks about the detection and steps taken by him thereafter. He would say that he had arrested two of the accused and he examined the vehicle in the presence of two witnesses. He speaks about the articles seized. It is disheartening to note the casual manner in which Ext.P5 mahazar has been prepared by PW3. He simply says he took samples from the contraband articles seized. As to what is

the quantity of samples taken, whether two samples were taken and whether the samples were taken in accordance with law are conspicuously absent in the mahazar. It is not discernible from Ext.P5 whether there was any label affixed on the samples taken or whether it contained the signature of the detecting officer and at least the accused so also is the case of residue of articles. Going by the evidence of PW5, three samples have been drawn. But, going by Ext.P7 property list produced before court, there is only one sample. The endorsement on Ext.P7 shows that all the articles were returned to the Police Officer and there was no sufficient place to keep the property in the property room of court. Strictly, going by Ext.P7, it does not show that two other samples which PW3 claims to have been taken have been produced before court.

8. As regards the sampling is concerned, it has to be in conformity with the provisions of Abkari Act and provisions of Excise Manual. This Court had occasion to consider the issue whether two samples will have to be taken as enjoined by Clause 34 of Excise Manual in the unreported decision in CrI.A.No.1411/2005 which was disposed of by judgment dated

31.01.2007. It was observed in paragraph 3 of the judgment as follows:

“..... As per Clause 34 of the Excise Manual, it is mandatory on the part of the Excise Officials or the Police Officials to take two separate samples from the contraband article and to be sealed and labeled in the presence of the witnesses and the accused and that also be produced before the court.....”.

9. Therefore, this Court has accepted the necessity and obligation of the detecting officer to strictly comply with the provisions of Excise Manual. That has not been done in the case on hand. Though in the judgment it is mentioned that pieces of cardboard boxes have been produced before court, that are not seen marked. Again it must be remembered that there is no case for PW3 that after having drawn the samples, he had sealed them and labeled. He even does not go to the extent of detailing about the samples taken by him.

10. The lower court may be justified in its conclusion that the samples received in court were sent for chemical analysis as evidenced by Ext.P9 document. The question is not whether samples were sent for examination. But whether samples sent

for examination were the samples taken from the place of occurrence. In the absence of any statement by PW3 that he had properly taken the samples and sealed them and the labels affixed on them contained the alleged signature of the accused, one cannot take it for grant that samples produced before court are the samples taken by him at the time of occurrence of the incident.

11. In the light of the above infirmities and lacunas in the evidence and preparation of records, it will be hazardous to enter into a finding of guilt against the accused.

For the above reasons, this appeal is allowed. The conviction and sentence passed against the accused persons are set aside and they are found not guilty. The bail bond executed by the accused shall stand cancelled and they are set at liberty.

Sd/-

**P.BHAVADASAN
JUDGE**

smp

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P.A to Judge.