

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 7TH DAY OF DECEMBER 2015/16TH AGRAHAYANA, 1937

CRL.A.No. 1013 of 2006

AGAINST THE JUDGMENT IN SC 773/2005 of III ADDITIONAL SESSIONS
COURT (ADHOC), FAST TRACK COURT No.I, THRISSUR DATED 10.04.2006

APPELLANT/ACCUSED:

THANKAMANI @ MARUTHASALAN,
S/O. VAYYAPURI, ELLUKADU HOUSE, KANIYANKODE VILLAGE
ERAVATHODY DESOM, THALAPPILLY TALUK.

BY ADVS.SRI.K.P.VIJAYAN
SRI.V.M.SYAM KUMAR
SMT.KRIPA ELIZABETH MATHEWS

RESPONDENT/COMPLAINANT:

STATE OF KERALA, REPRESENTED BY
EXCISE INSPECTOR, PAZHAYANNUR RANGE, THRISSUR DISTRICT,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM, KOCHI - 31.

BY SMT. S. HYMA, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
07-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.1013 OF 2006

Dated this the 7th day of December, 2015.

J U D G M E N T

The accused was prosecuted for the offence punishable under Sections 8(1) and (2) of Abkari Act. After trial, he was found guilty of the offence under Section 58 of Abkari Act and was convicted and sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs.1 lakh with default clause of simple imprisonment for three months. Set off as per law was allowed.

2. The incident which gave rise to the case occurred on 10.02.2004. On that day, PW1, the Preventive Officer under the Excise Department was set out for routine patrol duty along with other officers and when they reached Parayan colony near the house of one Kumaran, they happened to see the accused coming along the road carrying a can. He was intercepted and the can was seized and the contents were examined in the presence of independent witnesses. The can was having a capacity of 5 liters

and it was full of arrack. He took sample of 180 ml from the article in a bottle and had it sealed and labeled. The label contained the signature of accused, witnesses and PW1. Ext.P1 is the seizure mahazar prepared by him. It contains the signature of PW1 and the witnesses. They returned to the office and entrusted the accused and articles to the Preventive Officer who was in charge in the absence of Excise Inspector.

3. PW4 was discharging the functions of Excise Inspector at that time. According to him, accused and documents along with the contraband articles were brought before him and he registered Crime No.4/2004 for the offence under Sections 8(1) and (2) of Abkari Act. Ext.P2 is the crime and occurrence report. He prepared the forwarding note for sending the sample for chemical analysis and obtained Ext.P3 report. Ext.P4 is the property list prepared by him.

4. PW5 took over investigation. He prepared Ext.P5 scene mahazar, recorded statement of witnesses, completed the investigation and laid charge before court.

5. The court before which charge 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, Thrissur under Section 209 Cr.P.C. The said court made over the case to III Additional Sessions Court (Adhoc), Fast Track Court No.1, Thrissur for trial and disposal. The latter court, on receipt of records and on appearance of accused, framed charge for the offence under Sections 8(1) and (2) of Abkari Act, to which, the accused pleaded not guilty and claimed to be tried.

6. The prosecution therefore had PWs 1 to 6 examined and Exts.P1 to P6 marked. M.O.1 was got identified and marked.

7. 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.

8. Finding that the accused could not be acquitted under Section 232 Cr.P.C, he was asked to enter on his defence. Ext.D1 was marked on his side.

9. Presumably, on the basis of the evidence furnished by PWs 1 and 3 taken along with the mahazar prepared at the place

of occurrence and also the fact that the accused and the contraband articles were promptly produced before court, court below came to the conclusion that the accused has committed the offence under Section 58 of Abkari Act. The conviction and sentence as already mentioned followed.

10. Assailing the conviction and sentence, learned counsel appearing for the appellant raised two contentions for consideration; 1) forwarding note which contains the specimen seal is not produced and that is fatal to the prosecution and 2) the court having found by virtue of Ext.P3 that contraband is arrack, invoked Section 58 of Abkari Act to convict the accused. That is not proper.

11. Labouring on the first point, relying on the decision in **Majeedkutty vs. Excise Inspector** (2015 (1) KLT 624), it is contended by the learned counsel appearing for the appellant that marking of forwarding note which contains the specimen of the seal affixed on the sample is an essential requirement of law because that is the only guarantee for the court to ensure that the sample which reached the laboratory is the sample taken

from the contraband seized from the possession of accused. Failure to produce that document enables the accused to secure an acquittal.

12. Labouring on the second point, learned counsel for the appellant contended that while meeting the charge under Section 58 of Abkari Act, it may be possible to revert to Sections 8(1) and (2) in case offence under Section 58 is not established. Vice versa is not possible. Learned counsel brought to the attention of this Court the wordings in Sections 8(1) and (2) and also the wordings in Section 58. While Section 8(1) does not involve any mensria as such, Section 58 says otherwise. It pre-supposes the existence of certain conditions for the enforcement of provisions. Learned counsel pointed out that that mensria has to be established by the prosecution. In the absence of any pleadings and evidence to that effect, accused could not have been convicted.

13. Learned Public Prosecutor, on the other hand, contended that the evidence of PWs 1 and 3 are sufficient to show that the contraband was seized from the possession of

accused. If any doubt is created, that is cleared by the recital in Ext.P1 mahazar which is a contemporaneous record containing all the details of the acts done by PW1. The chemical analysis report, Ext.P3, it is pointed out, does not specifically show that the sample sent for analysis was arrack.

14. Before going into the contentions raised by the learned counsel for the appellant, it is necessary to advert to one aspect. Since Ext.P3, which clearly mentions the percentage of ethyl alcohol, is silent about the nature of the sample, the court below felt that there is no evidence to show that contraband seized was arrack and convicted the accused under Section 58 of Abkari Act. The question as to what is arrack is considered in the decision in **Asokan vs. State of Kerala** (1998 (1) KLT 330). That decision was rendered in the light of the challenge to then brought about amendment to Abkari Act. One of the questions raised was that unlike in earlier Act, the amended Act does not prescribe any standard to ascertain what exactly is arrack so as to distinguish it from other contraband article. As an answer to that question, this Court held as follows:

“..... We cannot accept such a contention. Legislature in its wisdom has defined 'arrack' as a potable liquor other than toddy, beer, etc. The intention of the Legislature appears to be to prohibit arrack of any strength. Hence, it cannot be said that the definition of arrack is vague, since no minimum strength is prescribed”.

15. In the decisions in ***Majeedkutty vs. Excise Inspector*** (2015 (1) KLT 624) and in ***Krishnan vs. State*** (2015 (2) KLT SN 8), the question as to the consequence of not filing forwarding note or forwarding note produced does not contain the sample seal was considered. The Court, after advertng to the fact that the form of forwarding note provides a blank space for affixing specimen seal, indicated that it is a mandatory provision. This Court went on to hold that in the absence of specimen seal, it may not be possible for the court to come to the conclusion that sample sent for analysis is the sample taken from the contraband seized from the possession of accused. It is not a mere technicality. This Court even went to the extent of holding that absence of specimen of sample seal creates a doubt whether sample seal was sent to the analyst also. Whatever that be, this

Court has made it clear that specimen of sample seal in the forwarding note must be made available to the court and it should be marked in the proceedings. If that be the standard, necessarily, the prosecution case falls to ground.

16. Coming now to the question as to the propriety of convicting the accused under Section 58 of Abkari Act, it is quite improper for the court to resort to Section 58 after having observed that Sections 8(1) and (2) of Abkari Act are not applicable. As already stated, Section 8(1) is applied under particular circumstances wherein certain ingredients have to be established. It speaks of possession coupled with knowledge and that indicates that element of mensria must be proved. Obviously, there is no such pleading or evidence in that regard. By no stretch of imagination, the case could have been brought under the penal provision contemplated by Section 58. On that ground also, this appeal has to succeed.

For the above reasons, this appeal is allowed. The conviction and sentence passed by the court below for the offence under Section 58 of Abkari Act 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.