

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, 1937

CRL.A.No. 932 of 2005 ()

AGAINST THE JUDGMENT IN SC 416/2000 of ADDL.S.C.-TRIAL OF ABKARI ACT
CASES, NEYYATTINKARA DATED 11-04-2005

APPELLANT(S)/ACCUSED: :

BABU, S/O. KUTTAN, POTTAVILA VEEDU,
NEAR C.G.O. COMPLEX, POOMKULAM, PACHALLOOR DESOM
THIRUVALLOM VILLAGE.

BY ADVS.SRI.R.T.PRADEEP
SRI.V.VIJULAL

RESPONDENT(S)/COMPLAINANT: :

THE STATE OF KERALA, REP. BY
THE DIRECTOR GENERAL OF PROSECUTION
HIGH COURT OF KERALA, ERNAKULAM.

R1 BY ADV. SRI. GITHESH.R., PUBLIC PROSECUTOR

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

acd

P.D. RAJAN, J.

Crl.Appeal No.932 of 2005

Dated this the 26th day of May, 2015

JUDGMENT

This appeal is filed against the judgment in S.C.No.416/2000 of the Additional Sessions Judge [Abkari cases], Neyyattinkara, whereby the appellant was convicted u/s.58 of the Abkari Act and he was sentenced to undergo rigorous imprisonment for one year and to pay a fine of ₹1,00,000/-, in default of payment of fine, imprisonment for three months.

2. The facts necessary for the indictment were that on 12.2.1998 at 7 p.m., the Sub Inspector of Police, Kovalam was conducting patrol duty within his jurisdiction, when he reached at Poonkulam in Pachalloor desom, Thiruvallam

Village, he got an information that one Babu of Pottavila house was selling arrack in the property of one Peerumuhammed. Suddenly, the Police party reached at the place of occurrence, at that time, the appellant was found carrying a jerry can containing 9 litres of arrack and a glass. He was arrested with the contraband articles and seizure mahazar was prepared. The Sub Inspector registered a crime and after investigation, he laid charge before Judicial First Class Magistrate Court-III, Neyyattinkara. Subsequently, the case was committed to Sessions Court for trial.

3. For establishing the alleged charge, prosecution adduced the oral evidence of PW1 to PW3 and admitted documentary evidence of Exts.P1 to P4. Material objects were marked as Mo1 and Mo2. The incriminating circumstances brought out in evidence were denied by the

accused while questioning u/s.313 Cr.P.C. He was also heard u/s.232 of Cr.P.C. Defence witness DW1 was examined. The trial Court, after analysing the evidence, convicted the appellant u/s.58 of the Abkari Act.

4. The learned counsel for the appellant contended that sample was not taken at the time of seizure or at the Police Station. The jerry can was sealed by the Sub Inspector, which was stated by him at the time of examination. During examination, he denied the seal in the jerry can. The evidence of DW1 was not considered by the trial Court. When the sample has not been properly taken by the detecting officer or the investigating officer, the accused is entitled to get the benefit of doubt.

5. In the instant case, the Sub Inspector of Police, Kovalam, was examined as PW3 to prove the seizure. His evidence shows that on the date of incident, while he was

conducting patrol duty with the police party, at about 7 p.m. he reached Poonkulam and got information that the appellant was conducting sale of arrack in the property of Peermuhammed. When he reached at the place of incident, appellant was found carrying 9 liters of arrack and he seized the contraband articles, after preparing Ext.P1 mahazar, which were marked as Mo1 and Mo2 during trial. Ext.P2 is the FIR. He prepared a forwarding note and forwarded the sample for chemical examination. But, in cross examination, he admitted that he put a seal in the seized articles, but nothing has been stated by him as to whether he took the sample at the place of occurrence. In Ext.P1 also, no mention about the sample. PW2, the Head Constable deposed that Mos 1 to 2 were taken into custody, after preparing Ext.P1 mahazar. But, the independent witness PW1 did not support the case, but he

admitted signature in Ext.P1.

6. However, in the light of the seizure, I have considered whether the detecting officer had produced the seized articles before the officers in charge of the Police Station and kept those articles in the safe custody, awaiting orders of the Magistrate and also considered as to whether he has affixed his seal in such articles and samples were taken from the articles and such samples taken were also sealed with the seal of the officer in charge of the police Station. There is no evidence from the side of PW3 to show that he took the sample from the police station or at the place of occurrence. He deposed that the seized articles were sealed at the place of occurrence. When he took samples, it has to be mentioned in his case diary or in the seizure mahazar as to how the sample was sealed and forwarded to the Chemical

Examiners' Lab. In Ext.P3, it is admitted that the seal was in tact.

7. This Court in Sasidharan v. State of Kerala

[2007(1) KLT 720] held as follows:

"9. There is no evidence to whose that the sample, which was analysed under Ext.P5 chemical report, was the sample taken from the can allegedly seized from the accused. When the sample changed hands before reaching the Chemical Examiner the Prosecution had to necessarily examine the various persons who were in custody of the sample to prove that while in their custody the seals on the sample had not been tampered with (See AIR 1980 SC 1314 State of Rajasthan v. Daulat Ram and 1993 (2) KLT 550 SC - Valsala v. State of Kerala). The prosecution had a duty to prove that it was the sample taken from the contraband liquor seized from the accused which had reached the hands of the Chemical Examiner in a fool proof condition. For this, there is no evidence."

8. Without any connecting evidence of actual sampling by the concerned detecting officer by drawing sample from the can and sending the same in a sealed packet to the Chemical Examiner through Court with a

specimen seal sent separately for tamper proof despatch, the Prosecution cannot say that the appellant committed an offence under the Abkari Act. In short, I am of the opinion that prosecution has to prove that it was the sample taken from the contraband liquor seized from the accused, which had reached the hands of the Chemical Examiner in a fool proof condition. There is no evidence to show that the sample was taken from the can seized from the appellant. Therefore, the appellant is entitled to get the benefit of doubt.

In the result, the conviction and sentence passed by the trial Court u/s.58 of the Abkari Act are set aside. The appellant is set at liberty.

Crl.Appeal is allowed.

P.D. RAJAN, JUDGE.

