

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. 1097 of 2006

AGAINST THE JUDGMENT IN SC 1161/2001 of ADDL.SESIONS COURT FOR
TRIAL OF ABKARI ACT CASES, NEYYATTINKARA DATED 18-05-2006

APPELLANT/ACCUSED:

PRABHAKARAN, S/O. GOPALAN,
PLANKALA VEEDU, KEEZHOOOR, MUTTAKKADU DESOM,
THIRUVALLAM VILLAGE, THIRUVANANTHAPURAM.

BY ADV. SRI.V.S.BABU GIREESAN

RESPONDENTS/STATE AND THE COMPLAINANT:

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1. THE STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.
 2. THE SUB INSPECTOR OF POLICE,
THIRUVALLAM POLICE STATION, THIRUVANANTHAPURAM.

BY SMT. S. HYMA, PUBLIC PROSECUTOR.

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

P.BHAVADASAN, J.

Crl. Appeal No.1097 OF 2006

Dated this the 3rd day of December, 2015.

J U D G M E N T

The accused, though charge sheeted for the offence punishable under Section 55(a) of Abkari Act, was ultimately found guilty of the offence under Section 58 of Abkari Act. He was therefore convicted and sentenced to suffer rigorous imprisonment for two years and to pay a fine of Rs.1 lakh with default clause of rigorous imprisonment for three months. Set off as per law was allowed.

2. The prosecution case is that on 11.07.2000, PW4, Sub Inspector of Police, Thiruvallam Police Station along with PW3 Head Constable and others, on getting reliable information about sale of illicit arrack by one Prabhakaran proceeded to the spot and found that the accused was engaged in sale of illicit arrack. In a 5 liter capacity can, they found 4 liters of arrack. They also found a glass having the smell of arrack. The accused was arrested from the spot itself. The can and the glass were seized.

The amount with him was also seized. PW4 prepared Ext.P1 mahazar. Thereafter he returned to the station and as per Ext.P2 First Information Report, registered Crime No.77/2000. He produced the seized articles before court as per Ext.P5 property list. Ext.P6 is said to be the chemical analysis report received by him. He sent a requisition to the court for sending the sample for chemical analysis. He had taken the statement of witnesses, completed the investigation and laid charge before court.

3. 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, Thiruvananthapuram. The said court made over the case to Additional Sessions Court for trial of Abkari Act cases, Neyyattinkara for trial and disposal. The latter court, on receipt of records and on appearance of the accused, framed charge for the offence under Section 55(a) of Abkari Act. To the charge, accused pleaded not guilty and claimed to be tried.

4. The prosecution therefore had PWs 1 to 5 examined and Exts.P1 to P7 marked. M.O.s 1 and 2 were got identified and

marked.

5. 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. He also stated that he has not committed any act which would constitute an offence.

6. 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.

7. The court below, accepting the evidence of PWs 3 and 4 and also relying on the mahazar said to have been prepared by PW4, went on to find the accused guilty for the offence under Section 58 of Abkari Act. The conviction and sentence as already mentioned followed.

8. Assailing the conviction and sentence, learned counsel appearing for the appellant contended that even all what the prosecution says is true, the offence under Section 58 of Abkari Act cannot be attracted for the simple reason that even going by the facts, none of the ingredients necessary to attract Section 58

is available in the case on hand. It is then pointed out that sampling was done from court. PW5, thondi Clerk, has been examined to show that sample was taken from court. But his evidence does not appear to be a true version and there is nothing to show that he was acting under the order of the Magistrate concerned. There is no proper sampling and if that be so, according to the learned counsel, accused is entitled to acquittal.

9. Learned Public Prosecutor, on the other hand, contended that evidence of PWs 3 and 4 are sufficient to show that prosecution has succeeded in establishing the case against the accused. There is no reason to doubt their version and the court below has chosen to accept the same. Unless there are compelling reasons, it may not be proper for this Court to disbelieve PWs 3 and 4 and to take a different view.

10. In the decision in **Majeedkutty vs. Excise Inspector** (2015 (1) KLT 624), the significance and necessity to produce forwarding note has been considered. In the said decision, it has been held as follows:

“7. It is the prosecution case that the bulk of the contraband as well as the sample collected were sealed by PW3. PW3 also deposed that they were so sealed. The description in the List of Property does not show that the bulk was so sealed. Be that as it may, the sample is described in the List of Property as sealed. Whose seal was so affixed? No evidence is available regarding that aspect of the matter. It is noted in Ext.P3 Certificate of Chemical Analysis that the seal on the bottle was intact and found tallied with the sample seal provided. Whose sample seal was so provided? None of the excise officials examined in the case deposed that sample seal was so provided. No Forwarding Note is seen among the case records. PW4 deposed before the court that he had submitted a requisition before the court for subjecting the sample to Chemical Analysis. It is usual that seal of the court will be affixed while sending the sample to the Chemical Examiner for analysis. Therefore, the sample seal noted in Ext.P3 can be the seal of the court also. A comparison of the seal of the court affixed on the bottle containing sample with the specimen seal of the court will not give any assurance that the sample of

the contraband allegedly seized from the appellant has, in fact, reached the Chemical Examiner for analysis. Such an assurance is possible only when the sample seal of the seal affixed on the sample was provided to the Chemical Examiner for comparison. Such a link evidence is missing in this case. Therefore, there is no assurance that the Chemical Examiner examined really the sample taken from the bulk allegedly seized from the appellant in this case. Hence, the report in Ext.P3 that ethyl alcohol was detected in the sample will not connect the accused with the crime alleged.

8. This Court in *Rajamma v. State of Kerala* (2014 (1) KLT 506) has held as follows:

“ The investigating officer has also deposed that he is not aware whether any specimen seal is produced before the court. So, absolutely there is no evidence to convince the court that the prosecution has proved that the sample seal or specimen impression of the seal, alleged to have been affixed in the sample by PW.1 has been provided to the chemical examiner for their verification and to ensure that the sample seal, so provided, is tallying with the seal affixed on the sample bottle. In spite of the above fact and in the

absence of sample seal, however in Ext.P3, it is certified that the seal of the sample bottle is in tact and tallied with sample seal provided. Therefore, according to me, no evidentiary value can be given to Ext.P3 chemical analysis report. In the absence of any link evidence to show that the very same sample which drawn from the contraband article allegedly seized from the possession of the accused reached the hands of the chemical examiner, it is unsafe to convict the appellant who is a lady.”

A Division Bench of this Court in Ravi v. State of Kerala (2011 (3) KLT 353) has held that the prosecution 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 in a tamper-proof condition. Also held that no conviction can be entered against the accused in a prosecution unless it is proved that the sample which was analysed in the Chemical Examiner's Laboratory was the very same sample drawn from the contraband liquor allegedly found in the possession of the accused.”

11. In the case on hand, PW4, investigating officer, has clearly stated that he had filed a forwarding note before court requesting to take sample and sent it for chemical analysis. He gets support in this regard from PW5 also. PW5 is the Thondi Clerk of the Judicial First Class Magistrate Court concerned. He stated that as on the date of occurrence, he was the thondi Clerk and he received the articles as per Ext.P5 property list. It is claimed by him that it was as per the orders issued to him that he had taken sample of the articles from the properties surrendered before court. The relevant entry in the thondi register is marked as Ext.P7. In cross examination, he stated that the order to take sample was made on the forwarding note and there will be no other entries in the register indicating that he had taken sample under the orders of the Magistrate. He also stated that the requisition made by the prosecuting agency may not be available in any register.

12. There is no dispute regarding the fact that forwarding note has not been produced before court. The result is that the court has no idea about the seal that is alleged to have been

affixed on the sample. In the light of the decision cited above, non production of forwarding note is fatal to the prosecution.

13. Again the prosecution further weakens by the evidence of PW5, thondi Clerk who says that he received the articles and had taken samples. Though in chief examination he says that he was acting under the orders of the Magistrate, in the cross examination, he stated that such an order will not find a place in any register. In fact, it is clear that the detecting officer had not taken any sample from the contraband article. The ambiguity created in the evidence of PW5 regarding sampling goes a long way in favour of the accused. A reasonable doubt is created regarding the version given by PW5. It follows that merely because a parrotlike version is given by PWs 3 and 4, case put forward by the prosecution cannot be rightly accepted. The other items of evidence mentioned above and the materials sought to be produced go in favour of the accused.

For the above reasons, this appeal is allowed. The conviction and sentence passed by the court below are set aside and it is held that the accused is not guilty of the offence under

Section 58 of Abkari Act. 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

// True Copy //

P.A to Judge.