

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. 1108 of 2006

AGAINST THE JUDGMENT IN SC 1027/2001 of ADDL.SESIONS COURT FOR
TRIAL OF ABKARI ACT CASES, NEYYATTINKARA DATED 18-05-2006

APPELLANT/ACCUSED:

SIMON,
S/O.KUTTAN, PELEYADAVILA PUTHEN VEEDU,
MURYANKARA DESOM, PARASSALA VILLAGE,
NEYYATTINKARA TALUK.

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

RESPONDENT/COMPLAINANT:

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

BY SMT. LILLY LESLIE, 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.1108 OF 2006

Dated this the 7th day of December, 2015.

J U D G M E N T

The accused faced prosecution for the offence punishable under Section 55(a) of Abkari Act. After trial, he was found guilty for the offence under Section 58 of Abkari Act and 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 30.09.1997, PWs 2 and 3 along with other officers had gone for routine patrol duty. When they reached near Polakkavila Pentecost church, they happened to see the accused coming along the road carrying a can. He was intercepted and the can was seized. By taste and smell, the contents of the can was identified as arrack. The can had a capacity of 5 liters and it was full of contraband article. After preparing arrest memo, accused was arrested. The

contraband was seized and sealed and a slip containing the signature of accused and witnesses was affixed on the same. PW3, after reaching the office, registered crime as per Ext.P3 occurrence report. Ext.P5 is the property list prepared by him and it was received on 01.10.1997. He also filed a requisition to court to take sample for sending the same for chemical analysis. The report received is Ext.P6.

3. Investigation was done by PW4. He recorded the statement of witnesses, completed investigation and laid charge before court.

4. 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 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.

5. The prosecution therefore had PWs 1 to 5 examined and Exts.P1 to P7 marked. M.O.1 was got identified and marked.

6. 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.

7. 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.

8. Probably, based on the evidence of PWs 2 and 3 taken along with Ext.P1 mahazar and also impressed by the prompt production of accused and articles before court, the lower court came to the conclusion that the prosecution has succeeded in establishing the case against the accused. The conviction and sentence as already mentioned followed.

9. Sri.R.T. Pradeep, learned counsel appearing for the appellant contended that there is no forwarding note seen marked in the case and there is no evidence of specimen of sample seal used by the authority concerned. In the absence of

forwarding note, it may not be possible to conclude that the sample sent for chemical analysis is the sample taken from the contraband seized from the possession of accused. Learned counsel then pointed out that charge was under Section 55(a) and the accused has been convicted under Section 58. It could not be said that either of them is a cognate offence. They are two independent provisions dealing with two different situations. There is nothing in common between the two Sections.

10. In the case of Section 58 of Abkari Act, according to the learned counsel for the appellant, a reading of the provision itself says that an element of mensria is required. There is no such mensria established in the case. On this ground also, according to the learned counsel, the conviction cannot stand.

11. Learned Public Prosecutor, on the other hand, contended that the evidence of PWs 2 and 3 taken along with Ext.P1 mahazar and also the fact that articles and accused have been promptly produced before court rules out the possibility of manipulation or fabrication of document. Moreover, learned Public Prosecutor contended that there is not even a suggestion

to PWs 2 and 3 that they were in inimical terms with the accused. There is also no suggestion to them that they had any reason to falsely implicate the accused. Anyhow, the lower court has chosen to accept their evidence and there is no reason as to why the conviction could be reversed.

12. True, PWs 2 and 3 give a uniform version about the incident. Among them PW2 is the Preventive Officer and PW3 the Excise Inspector. Both of them say that on the date of incident, they had gone for routine patrol duty and on the way they happened to come across accused carrying a can. As usual, can was seized and the contents were examined and it turned out to be arrack. PW3 says about registration of crime, preparation of property list and filing requisition to send the sample for chemical analysis. Even though PWs 2 and 3 were cross examined at length, there is no inconsistency in their evidence and there is no reason to disbelieve them.

13. True, independent witness has turned hostile to the prosecution and does not support the prosecution case. But it is not always necessary that testimony of officers should be

corroborated by other independent witness. It all depends upon the creditworthiness of the testimony given by the officers. Further, Ext.P1 mahazar contains all the essential details and that being a contemporaneous document, it is entitled to considerable weight.

14. Probably, from the above items of evidence, it could be said that contraband was in fact seized from the possession of accused. However, there is one glaring fact which would create considerable difficulty in confirming the conviction. That is non production of forwarding note.

15. It may not be out of context to refer to the evidence of PW5 at this point of time. PW5 is the thondi Clerk of the Magistrate Court concerned where the articles were produced. PW5 accepted that while she was functioning as U.D Clerk, as per Ext.P5 property list, she received the contraband articles produced by the Excise Officer. The relevant entries made by her in the relevant document is Ext.P7. She asserts that it was as per the orders of the Magistrate that she had drawn sample and there is an endorsement in Ext.P7 to show that sample and

contraband articles were received by the policeman deputed for that purpose. In cross examination, she was not able to answer whether the description of the seal said to have been used by the detecting officer was available in any documents. PW5 said that they have not separately produced the same. She also stated that the order of Magistrate is not recorded in Ext.P7. What is significant is that she does not say that she affixed any seal on the sample.

16. Now, one may have a look at Ext.P6 chemical analysis report which shows that seal on the bottle was intact and found tallied with the sample seal provided. It is difficult to understand which is the seal reference to which is being made to in Ext.P6. Obviously, PW5 does not say about any seal having affixed on the sample. She has no case that any seal was provided by the Excise Officials at the time of taking samples. This is precisely the reason why the court insists that specimen of sample seal should be filed along with forwarding note so that the court can be assured that the sample sent for analysis is the sample taken from the contraband seized from the possession of accused. If

there is any doubt, that is set at rest by the decision in **Krishnan vs. State** (2015 (2) KLT SN 8).

17. In the case on hand, forwarding note is not seen marked and there is no mention of the seal referred to in chemical analysis report. Therefore, a reasonable doubt is created in the mind of court regarding the sample that is sent for chemical analysis. If that be so, the benefit should certainly go to the accused.

18. Apart from the above fact, the court was disinclined to hold that Section 55(a) of Abkari Act is attracted and went on to invoke Section 58 of Abkari Act to convict the accused. The ingredients necessary to attract Sections 55(a) and 58 are entirely different and they dealt with two different circumstances and situations. A bare reading of Section 58 reveals that an element of mensria is required by the prosecution. The word 'knowing' indicate the said fact. There should be pleadings and evidence in that regard so that the accused could not be put on guard. In the case on hand, there is no ingredients to attract either Section 58 or Section 55(a). Section 55(a) deals with

import, export, transport, transit or possession of liquor. It could thus be seen that there is no common element in Section 55(a) and Section 58 except for the possession. On this ground also, the conviction cannot stand.

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.