

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. 1110 of 2006

AGAINST THE JUDGMENT IN SC 64/2001 of ADDL.SESIONS COURT FOR
TRIAL OF ABKARI ACT CASES, NEYYATTINKARA DATED 18-05-2006

APPELLANT/ACCUSED:

SIVANANDAN,
S/O.GANGADHARA PANICKER, MUKUNDAVILASOM PUTHEN VEEDU,
THIYANNOORKONAM, THEMPAMUTTOM, THALAYAL DESOM,
ATHIYANNOOR VILLAGE.

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.1110 OF 2006

Dated this the 7th day of December, 2015.

J U D G M E N T

Though prosecuted for the offence under Section 55(a) and (i) of the Abkari Act, after trial, accused was found guilty of the offence under Section 58 of Abkari Act. He was therefore convicted and sentenced to suffer rigorous imprisonment for one year and to pay a fine of Rs.1 lakh with default clause of rigorous imprisonment for one month. Set off as per law was allowed.

2. The incident occurred on 25.06.1999. On that day, PW4, the then Sub Inspector of Police, Balaramapuram Police Station along with PW3 and others had gone for routine patrol duty. On the way, they received reliable information regarding sale of arrack at a particular place. They went to the spot and found a person with a bottle standing near a bunk shop. Seeing the Police Officers, he tried to escape. He was intercepted and the bottle was seized. By taste and smell, the contents of the bottle was identified as arrack. The accused was arrested from

the spot. 180ml of arrack was taken in another bottle as sample and it was sealed. The accused had also had a glass with him and Rs.200/- was recovered from his purse. Ext.P1 is the mahazar prepared by PW4. He returned to the station and on the basis of seizure mahazar, he registered a crime as per Ext.P2 First Information Report. He prepared Ext.P4 property list and also filed requisition for sending the sample for chemical analysis and obtained Ext.P5 report. He completed the investigation and laid charge before court.

3. The court before which final report 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 Sections 55(a) and (i) of Abkari Act. The accused pleaded not guilty to the charge and claimed to be tried.

4. The prosecution therefore had PWs 1 to 4 examined and Exts.P1 to P5 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 wherein he denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent.

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, primarily impressed with the evidence of PWs 3 and 4 and the fact that Ext.P1 contemporaneous document prepared by PW4 contains all the details and also prompt production of accused before court, felt were sufficient to come to the conclusion that the prosecution has succeeded in establishing the case against the accused. Result was that the conviction and sentence as already mentioned followed.

8. Sri.R.T. Pradeep, learned counsel appearing for the appellant raised three points for consideration; 1) There is no

forwarding note produced and marked in the case and therefore the court has no idea about the specimen of the seal said to have been affixed on the sample, 2) The property list produced before court does not show that the contraband articles was sealed and 3) having charged for the offence under Sections 55(a) of Abkari Act, on finding that the said Section is not applicable, the court could not have convicted the accused under Section 58 of Abkari Act. It is also pointed out that had there been a proper sealing and labeling as now claimed by PWs 3 and 4, that would have found a place in the property list produced before court and in the absence of any mention of sealing and labeling, it has to be said that there is no proper sampling and sealing.

9. As far as the third contention is concerned, learned counsel appearing for the appellant contended that Section 55(a) and Section 58 are two distinct provisions dealing with two different situations and it could not be said that they are cognate offences. The only common element in those Sections is possession. The similarity ends there. Section 55(a) deals with possession during import, export etc. Section 58 deals with

possession knowingly of certain things made mention of in the Act which indicate that an element of mensria is absolutely essential to attract Section 58. This distinction has been lost sight of by the court below and the conviction and sentence under Section 58 cannot be sustained, it is contended.

10. Learned Public Prosecutor, on the other hand, contended that the evidence of PWs 3 and 4 are sufficient to show that accused was in possession of contraband article. There is no suggestion to them that they are inimical towards the accused or that they had any axe to grind against the accused. PW4 says about the circumstance by which they had occasion to meet the accused, seize of can and also identification of commodity etc. In all respects, PWs 3 and 4 complement each other and there is no contradiction or inconsistency in their evidence that makes their evidence vulnerable. Further, to add to that is the fact that Ext.P1 mahazar, a contemporaneous document, also contains all the essential details. In theory, it can be said that there is sufficient evidence to prove that the contraband was seized from the possession of accused. But, in

law, that is not sufficient. There are other factors to be considered. One of such elements is the chemical analysis report. The sample has been taken by PW4 and has been forwarded to the court. Though he says that he filed a requisition before court, no such forwarding note is seen marked in the case. Production of forwarding note and marking of the same is absolutely necessary in a case of this nature and the forwarding note must contain the specimen of the seal used by the officer concerned for the reason that that alone can ensure that the sample sent for chemical analysis is the sample taken from the contraband seized from the possession of accused. For the above proposition, learned counsel relied on the decisions in **Majeedkutty** vs. **Excise Inspector** (2015 (1) KLT 624) and in **Krishnan** vs. **State** (2015 (2) KLT SN 8). In the absence of any forwarding note, it becomes difficult to hold that the sample sent to the laboratory is the sample drawn by PW4 as claimed by him. On that ground, the appellant has to succeed.

11. As regards the contention regarding Sections 55(a) and 58 are concerned, it needs to be mentioned that there is

considerable force in the submission made by the learned counsel for the appellant. By no stretch of imagination, Section 58 can be attracted to the facts of the case. On this ground also, the appellant 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.