

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. 1138 of 2006 ()

AGAINST THE JUDGMENT IN SC 640/2001 of ADDL.SESIONS JUDGE FOR TRIAL
OF ABKARI ACT CASES, NEYYATTINKARA DATED 01-06-2006

WHICH IS

AGAINST THE ORDER/JUDGMENT IN CP 117/2000 of J.M.F.C.-
II, NEYYATTINKARA

APPELLANT/ACCUSED: :

SUGATHAN, AGED 39,
S/O. CHANDRASEKHARA PANICKER, EDAVILAKOM VEEDU
PALAPPUR, KALLIYOOR VILLAGE.

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

RESPONDENT/RESPONDENT: :

THE STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.

PUBLIC PROSECUTOR SMT. LILLY LESLIE.

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

kp/-

P.BHAVADASAN, J.

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Crl.A.No.1138 of 2006

Dated this the 7th day of December, 2015

JUDGMENT

On being found guilty for the offences punishable under Sections 55(a) and (i) of the Abkari Act, the accused was convicted and sentenced to undergo rigorous imprisonment for three years and to pay a fine of ₹1 lakh with a default clause of six months.

2. The facts fall within a very narrow compass. On 16.2.1999, PW4, who was the Sub Inspector of Police attached to the Thiruvallom Police Station, along with PW3 and other police officers were on patrolling duty and when they reached the Palappooru junction, they got reliable information that a person by name Sugathan is engaged in the sale of liquor in the plantain garden of one Krishnan Nair. The team of officers proceeded to that place. When they reached the place, they happened to see one person holding a bottle in one hand and a glass in other hand and they also found a black can nearby. As soon as that person sighted the excise officers, he tried to escape. He was intercepted and it is stated that he told the

officers that the bottle and the can contain arrack intended for sale. PW4, by taste and smell, was convinced that the liquid was arrack. The accused was arrested on the spot and two ten rupee notes found with him were also seized. The articles which were found at the place were sealed and taken into custody after preparing Ext.P1 mahazar. PW4 returned to the station and registered Crime No.32 of 1999 as per Ext.P2 FIR. On 17.2.1999, the accused was produced before the learned Magistrate. On the next day, the properties seized were handed over to the court after preparing Ext.P4 property list. He made a requisition to the court to take samples from each of the containers and to send a forwarding note. Chemical analysis report received by him is Ext.P5. PW4 took statements of witnesses, completed investigation and laid charge before court.

3. The court before which the final report was laid took cognizance of the offence. Finding that the offence is exclusively triable by a Court of Sessions, that court committed the case to Sessions Court, Trivandrum. The Sessions Court, Trivandrum in turn made it over to Abkari Court, Neyyattinkara for trial and disposal.

4. The latter court, on receipt of records and on appearance of accused framed charges for the offences punishable under Sections 55 (a) and (i) of the Abkari Act.

5. To the charge the accused pleaded not guilty and claimed to be tried. The prosecution therefore examined PWs 1 to 5 and had Exts. P1 to P6 marked. MOs 1 to 3 were got identified and marked.

6. After close of prosecution evidence, the accused was questioned under Section 313 of the Cr.P.C., wherein he denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent.

7. Finding that he could not be acquitted under Section 232 of the Cr.P.C, he was asked to enter on his defence. He chose to adduce no evidence.

8. Accepting the evidence of PWs 3 and 4 and impressed by Ext.P1, probably the court below formed the opinion that the offences have been made out and conviction and sentence as already mentioned followed.

9. Assailing the conviction and sentence, the learned counsel appearing for the appellant Sri. Pradeep contended that

conviction cannot be sustained due to more reasons than one. There was no proper sampling and also it could be seen that the forwarding note is not produced or marked before court. Relying on the decisions reported in **Joseph v. State of Kerala** (2009 (4) KHC 537), **Majeedkutty v. Excise Inspector** (2015 (1) KLT 624) and **Krishnan v. State** (2015 (2) KLT SN 8), it was contended that failure to produce the forwarding note containing the specimen sample seal is fatal to the prosecution. The learned counsel then pointed out that it is not clear from the judgment as to for what offence he has been actually convicted and sentenced. Whether it is for the offence under Section 55(a) or for the offence under Section 55(i). Even if either be the case, the conviction and sentence cannot stand. Obviously, seizure as spoken to by PWs 3 and 4 do not fall within the ambit of Section 55(a) of the Abkari Act, for the reason that it was not during export, import etc. As far as Section 55(i) is concerned, prosecution has an obligation to prove that either there was a sale or intended for sale. For the said purpose, the learned counsel relied on the decision reported in **Sidhan v. State of Kerala** (2014(2) KLT 893). Elaborating on the aspect, the

learned counsel pointed out that mere possession of a bottle and a glass will not ipso facto lead to a conclusion that sale was intended or the article was kept for sale. There is no pleadings or evidence in the case to show that the accused was actually engaged in the sale. On that count also the prosecution has to fail.

10. The learned Public Prosecutor on the other hand heavily relied on the testimony of PWs 3 and 4 and contended that there is no reason to disbelieve them. The two independent witnesses admitted their signatures though denied having seen the actual seizure. The evidence of PWs 3 and 4 gain sufficient corroboration from Ext.P1, the mahazar prepared on the spot containing all the details and the prompt production of the articles and the accused before the court lends credence to the prosecution version of the incident. The court below has chosen to accept these items of evidence and there is no reason as to why this court should take a different view. Thus, the learned Public Prosecutor contends that the conviction and sentence will have to stand.

11. In spite of best efforts made by this Court, this Court is

unable to sustain the contention raised by the learned Public Prosecutor. It is true that the testimony of PWs 3 and 4, the two police officers to a considerable extent supports the prosecution version of the incident. They give a uniform, consistent and cogent version of the incident and there is no inconsistency or contradiction in their evidence in spite of searching cross examination. Both of them say that while on patrol duty, they happened to get reliable information of the accused being engaged in sale of liquor and they proceeded to the spot. They are consistent in their version that the accused on seeing the police officer tried to escape but was successfully prevented from doing so. The articles in his possession was seized and that was found to be arrack. Both of them say that Ext.P1 mahazar was drawn up at the spot and the police team along with the accused and contraband articles returned to the police station. Thereafter, the crime was registered and the investigation was completed by PW1.

12. It is also true that Ext.P1, the mahazar said to have been prepared at the spot gives a vivid description of what had transpired at the place. If one is to be solely guided by these

items of evidence, probably the stand taken by the learned Public Prosecutor could be upheld. But unfortunately, certain technical aspects stand in the way of this Court from confirming the judgment of the court below.

13. The mere fact that some contraband articles have been seized from the possession of a person does not ipso facto make him liable for the offences under the Act. Different offences have different ingredients and it is absolutely necessary that for the prosecution to establish those ingredients to attract the necessary provision. In the case on hand, Section 55(a) and 55 (i) have been included. As far as Section 55(a) is concerned, it contemplates possession for export, import etc as has been held by this Court in various decisions. As far as Section 55(i) is concerned, the decision relied on by the learned counsel for the appellant, i.e., **Sidhan v. State of Kerala** (supra) it was held as follows:

"17. Argument advanced by the learned counsel for the accused is that for booking a person for the first limb of S.55(i) of the Act (ie., for sale of liquor), it must be established that the detecting officer saw the accused actually selling the liquor. Learned counsel for the accused argued that the word 'sells' used in the statute in present tense assumes great

importance. According to the accused, it indicates that the sale should be one happening at the time of detection. In other words, a person cannot be arrested alleging that he sold liquor at an earlier point of time. It is the contention of the accused that use of present tense in the provision is indicative of the fact that a person can be arrested only when he is found to be engaged in sale of liquor. This argument is opposed by the learned Prosecutor by contending that it is not the law that the accused could be arrested only when he is found selling the liquor. He can be booked for the offence under S.55(i) of the Act, if he possessed liquor for sale. If we consider the two aspects dealt with in S.55(i) of the Act, it is evident that both sale of liquor and storage of the same for the purpose of sale are made punishable. I am of the view that the word 'sells' in S.55(i) of the Act is used by the legislature with a definite purpose. What is sought to be prevented by the provision is illicit sale of liquor. It is axiomatic that the legislature may not use any word or expression without ascribing a meaning to it or without intending any result or effect unless the subject or context clearly indicate otherwise. Here, it is evident that the legislature wanted to make unauthorised sale of liquor an offence. The expression "sells" in S.55(i) of the Act can only be viewed as a sale *in presenti* and not a past sale. In other words, what is to be detected for making out an offence is actual sale of liquor or all preparedness for a sale of liquor. It is futile to contend that the offence is revealed only when the detecting officer saw the accused pouring liquor from a bottle to a tumbler and another person receiving the same for consideration. Allegations and proof by the prosecution to that extent need not be insisted. In my opinion, going by the expression 'sells' in S.55(i) of the

Act, the offence can lawfully be inferred, if the facts and circumstances alleged and proved in a particular case would lead to the irresistible inference, that the accused possessed liquor, even if it is for a prospective sale. Finding the accused with illicit liquor and in full preparedness for sale of it, like holding a tumbler for the use of customers, possessing cash received as sale proceeds, etc. are some indications to presume that the accused is engaged in sale of liquor. This illustration shall not be taken as exhaustive. There can be umpteen situations in which it can lawfully be deduced that the accused possessed liquor for effecting a prospective sale. The only requirement is that the prosecution should allege and prove facts and circumstances to indicate that the accused intended an illicit sale of liquor.”

14. All that the prosecution has shown in this case is that the accused was having a bottle and a glass with him. There is no case that there was anybody else near him or that he was actually seen engaged in the act of sale or that there could be presumption that the article was stored for sale. In the absence of these vital ingredients, it is not possible to accept the finding of court below that the offence under Section 55(i) is made out.

15. In fact, as rightly pointed out by the learned counsel for the appellant, it is not discernible from the judgment as to under which provision of law he was convicted, whether it is under 55(a) or 55(i). If the finding of the court below is that the

accused is guilty on both counts, necessarily sentence would have to be awarded. That is not done. Whatever that be it remains of academic interest in the light of other aspects to be considered hereinafter.

16. One of the formidable contentions raised by the learned counsel for the appellant is that, the forwarding note is not produced before the court and therefore, the court is deprived of the opportunity to ensure that the sample sent for chemical analysis is the sample taken from the contraband articles seized from the possession of the accused.

17. It is more so in this case because it is not the police officer who had taken the sample, but PW5, the Thondi Clerk who had done that exercise. His evidence is quite interesting. He deposes to having received the contraband articles and says that he took the sample as directed by his presiding officer. However, in cross examination, PW5 conceded that there is no endorsement that the articles produced by the police officer have been verified and found correct in the register. It was stated by PW5 that the order to take the sample was made on the forwarding note. It is here that the non production of forwarding

note assumes importance. Whether there was actually any order to that effect and whether there was any condition stipulated while taking the sample and whether those conditions have been fulfilled etc are all matters which could have been found out, had only the forwarding note been produced.

18. Further, as pointed out in the decisions reported in **Joseph v. State of Kerala** (2009 (4) KHC 537), **Majeedkutty v. Excise Inspector** (2015 (1) KLT 624) and **Krishnan v. State** (2015 (2) KLT SN 8), it is well settled by now that production of forwarding note containing the specimen of sample seal is a must to ensure proper prosecution and the logic behind that principle seems to be that, that is the only guarantee which the court has to ensure that the sample sent for chemical analysis is the sample taken from the contraband articles seized from the accused. This Court in two decisions had occasion to hold that failure to produce the forwarding note without specimen sample seal cannot be successful to the prosecution.

19. This Court even went to the extent of holding that the Court cannot assume or presume that the article analysed in the

laboratory is the sample taken either from the court or from the sample taken by the officers concerned in the absence of forwarding note contained the specimen sample seal. If that be so, the principle laid down in the above decision applies with all force to the facts of this case.

For the above reasons this court is unable to uphold the conviction and sentence passed by the court below and they are hereby set aside and the accused stands acquitted of the charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

**P.BHAVADASAN,
JUDGE**

kp/-