

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 16TH DAY OF DECEMBER 2015/25TH AGRAHAYANA,
1937

CRL.A.No. 1285 of 2006

AGAINST THE JUDGMENT IN SC 795/2001 of ADDL.S.C. FOR THE TRIAL
OF ABKARI ACT CASES,NEYATTINKARA.

APPELLANT(S)/ACCUSED:

SULOCHANA, D/O.KARTHYAYANI,
KIZHAKKANKARA CHIRAYIL, PUTHEN VEEDU, NILAMEL,
MUKUNTHARA DESOM, KALLIKKADU VILLAGE.

BY ADVS. SRI.GEO PAUL
SRI.SANU MATHEW

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA,
REP. BY THE SUB INSPECTOR OF POLICE,
NEYYARDAM POLICE STATION, BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SMT. S. HYMA.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
16-12-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 1285 of 2006

Dated this the 16th day of December, 2015.

JUDGMENT

The accused was prosecuted for the offence punishable under Section 55(a) and (i) of the Abkari Act. After trial, she was found guilty of the offences and she was, therefore, convicted and sentenced to undergo rigorous imprisonment for two years and to pay fine of Rs.1,00,000/-, in default, to undergo rigorous imprisonment for three months.

2. The prosecution case is that on 18.6.1999 P.W.3, who was functioning as Sub Inspector of Police, Neyyar Dam along with other officers were on patrol duty, they received reliable information that at a place called Nilamel, a lady by name Sulochana was vending in liquor. P.W. 3 and others reached the spot and found in the front of the house of Sulochana a black can having capacity of 2 litres and a

glass. The accused was found standing there nearby. She was approached and she ran away from the place. The can was opened and it was found to contain 1 ½ litres of arrack. The glass was also seized. Then the house was searched. From the house, a can of 20 litres capacity containing 10 litres of liquid was seized. On examining the contents, it was found to be arrack. All the articles along with the documents were produced before the station. P.W.3 registered crime as per Ext.P3 FIR. Property list is Ext.P4. P.W.3 made a requisition to the court to take sample. Chemical analysis report received is Ext.P5. Investigation was completed and final report was laid before court.

3. The court, before which final report was laid, took cognizance of the offence. Finding that the offence is exclusively triable by a court of Sessions, the said court committed the case 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.

4. The latter court, on receipt of records and on appearance of the accused framed charge for the offences punishable under Section 55(a) and (i) of the Abkari Act. To the charge, the accused pleaded not guilty and claimed to be tried. The prosecution therefore had P.Ws.1 to 4 examined and had Exts.P1 to P6 marked. M.Os.1 to 3 were identified and marked. After the close of the prosecution evidence, the accused was questioned under Section 313 Cr.P.C. wherein she denied all the incriminating circumstances brought out in evidence against her and maintained that she is innocent. Finding that the accused could not be acquitted under Section 232 Cr.P.C., she was asked to enter on her defence. She in her defence examined D.W.1.

5. The court below greatly impressed by the evidence of P.Ws. 2 and 3 found that the seizure has been

proved and in the light of the narration in the mahazar prepared by P.W.3 which is marked as Ext.P1, the court below found that nothing more is required to find the accused guilty. Conviction and sentence as already mentioned followed.

6. Learned counsel appearing for the appellant pointed out that there are various lacunas and infirmities in the prosecution case and that has not been considered by the court below at all. It cannot be disputed, according to the learned counsel, no sample was taken at the spot and the sample was taken from the court. If that be so, even though P.W.4 was examined and he admits of having taken sample as per the order of the court, there is nothing to show that he was given such an order by the Magistrate concerned. No such order is produced. Ext.P6 is the extract of the thondi register.

7. It is not discernible from the evidence as to what type of seal was used by P.W.4 to seal the sample. No sample

seal is produced also. In fact, learned counsel pointed out that no forwarding note is produced. It is not possible to find the authenticity of the sample sent for chemical analysis. In the light of such unsatisfactory state of affairs, it is contended that conviction cannot be sustained.

8. Learned Public Prosecutor on the other hand relied on the evidence of P.Ws. 2 and 3 and also Ext.P1 which is the contemporaneous document, and pointed out that the seizure is beyond challenge. Other technicalities like sampling etc shall not stand and the court below has chosen to believe the version of P.Ws. 2 and 3 and there is no reason to take a different view.

9. The matter is not as simple as learned Public Prosecutor puts it. Even assuming that the evidence of P.Ws. 2 and 3 is sufficient to prove the seizure of contraband article from the possession of the accused, still certain infirmities stare at the face of the prosecution.

10. Admittedly no sample was taken from the spot. Even though requisition is said to have been made, that has not been produced. Further P.W.4 does say that he had taken the sample as per the orders of the Magistrate. He is unable to produce the order of the Magistrate. Therefore, there is no evidence as of now to show that he was acting under the orders of the Magistrate when he was asked to take sample. There is no evidence as to how the sample was sealed and the type of seal affixed. It is here that absence of forwarding note assumes importance. In the decision reported in *Majeedkutti v. Excise Inspector* (2015 (1) K.L.T. 624), it was 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.”

Obviously the evidence of P.W.3 is that initially when the can was seized from the house of the accused, no sample was taken. There is nothing to show that any order was passed by the Magistrate directing the thondi clerk to take sample. There is nothing to show the date and time of taking sample etc. There is also no evidence regarding the seal said to have been used by him.

11. Forwarding note is also not produced. In the light of the decisions cited above, it is essential for ascertaining the authenticity of the sample sent for chemical analysis. In the light of the weak evidence, non-production of forwarding note added to the agony of the prosecution case.

12. Applying the principle laid down in the above decision, conviction cannot stand.

13. It is useful to refer to one aspect. The charge was for offence under Section 55(a) and (i) of the Abkari Act. Conviction was for offence under Section 58 of the Abkari Act. It is difficult to understand how Section 58 can be attracted in the absence of necessary ingredients. Whatever that be, it is only of academic interest.

For the above reasons, this appeal is allowed, the conviction and sentence passed by the trial court are set aside and it is held that the prosecution has not succeeded in proving the guilt of the accused beyond reasonable doubt. The accused is acquitted of the charges levelled against her. Her bail bond shall stand cancelled and she is set at liberty.

P. BHAVADASAN,
JUDGE

sb.