

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 17TH DAY OF SEPTEMBER 2015/26TH BHADRA, 1937

CRL.A.No. 946 of 2007 ()

**AGAINST THE JUDGMENT IN SC 1953/2001 of ADDITIONAL SESSIONS COURT FOR
TRIAL OF ABKARI ACT CASES, NEYYATTINKARA DATED 19-04-2007**

APPELLANT(S)/ACCUSED 1 AND 2::

- 1. SYAMALA, D/O.RAMAKRISHNAN,
VATTAVILA VEEDU, PIRAVILAKOM, VIAHINJAM VILLAGE.**
- 2. KUMARESAN, S/O.TITUS,
VATTAVILA VEEDU, PIRAVILAKOM, VIZHINJAM VILLAGE.**

BY ADV. SRI.S.MOHAMMED AL RAFI

RESPONDENT(S)/PETITIONER::

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

BY PUBLIC PROSECUTOR SRI. C.K. JAYAKUMAR

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 17-09-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 946 of 2007

Dated this the 17th day of September, 2015

J U D G M E N T

Accused, two in number, were prosecuted for the offence punishable under Section 58 of the Abkari Act. Both of them were found guilty. Therefore, they were convicted and sentenced to undergo rigorous imprisonment for one year each and to pay a fine of ₹1 lakh each with a default clause of rigorous imprisonment for three months each.

2. According to the prosecution, on 11.08.1999, while PW4 was sitting in the Police Station, he received reliable information that the accused were vending in illicit liquor. He along with his team of officers including a constable went to the place. When they reached the place, they found A1 holding a cannas and A2 also holding a cannas and also a glass. Seeing the police, they tried to escape. However, they were intercepted. The can, which each of them carried, was seized and contents were examined. It turned out to be

arrack. The can which was in the possession of A1 had 2 litres of illicit arrack. PW4 then claims to have sealed the cannas and thereafter, affixed the label containing the signature of the witnesses, the accused and himself. The can which was in the possession of the second accused was also seized and it contained one litre of arrack. He sealed the same in the similar way as that of the first can and claims to have affixed the seal containing the signature of the accused, witnesses and himself. He claims to have prepared Ext.P1 mahazar at the spot. He returned to the station and registered crime as per Ext.P2. He prepared property list and forwarded it to the court. He made a requisition to the court to take samples from the bottle and the relevant document is marked as Ext.P4. He recorded statement of witnesses and laid charge before court.

3. The Judicial First Class Magistrate-II, Neyyattinkara before whom the final report was laid, took cognizance of the offence. Finding that the offence is exclusively triable by

a Court of Sessions, the learned Magistrate committed the case to Sessions Court, Trivandrum under Section 209 Cr.P.C. after following the necessary procedures. The Sessions Court, Trivandrum made over the case to the Additional Sessions Court for Abkari Act Cases, Neyyattinkara for trial and disposal. The said court on receipt of records and appearance of accused before the said court framed charges for the offence punishable under Section 58 of the Abkari Act and read it out to the accused. They pleaded not guilty and claimed to be tried. The prosecution examined PWs 1 to 5 and had Exts. P1 to P9 marked.

4. After the close of prosecution evidence, the accused were questioned under Section 313 Cr.P.C.. They denied all the incriminating circumstances brought out in evidence against them and maintained that they were innocent. They denied having been in possession of the contraband articles.

5. Finding that they could not be acquitted under Section 232 Cr.P.C., the accused were asked to enter on their defence. They examined DW1.

6. The court below greatly impressed by the evidence of PWs 3 and 4 and also Ext.P1 document and to some extent, the evidence of PW5 also, found that the prosecution has succeeded in establishing the case against the accused and found them guilty. Conviction and sentence followed.

7. The learned counsel assailing the conviction and sentence contended that the court below has not adverted to some relevant aspects which would throw considerable doubt regarding the veracity of the prosecution case. It was pointed out that according to PW4, the person, who detected the offence, the officer had sealed the two cans alleged to have been in the possession of the accused persons and also affixed label containing the signature of the officer concerned, the accused and the witnesses. However, in the

property list forwarded to the court, there is no mention of sealing and labelling at all. Further, it is pointed out that in Ext.P6, the entry in the relevant records of the court concerned, the description of the articles received by the court is even more vague. There is no guarantee according to the learned counsel that what was forwarded to the court was the one seized from the accused or the entry in the register kept by the court do not answer the description made mention of in Ext.P1. The entries contained in court records do not indicate about any seal or label having been affixed on the two MOs.

8. The learned counsel then contended that PW5 claims to have taken the sample. It is not discernible under what authority he had taken the samples, for, the order enabling him to take the sample has not been produced. He simply says that there is a standing order that the sample shall be taken on the very day on which the articles are produced before court. The learned counsel pointed out that

one would have expected some records to be produced to show that he had done it on the same day. Further, the learned counsel pointed out that assuming the claim of PW5 to be correct, the sample reaches the laboratory on 15.10.1999, i.e. two months after the samples were taken. This to a considerable extent creates doubt regarding the version given by PW5 that the samples were taken on the day on which articles were produced before court. There is no explanation for this undue delay. The result is that a reasonable doubt is created as to whether the article produced before the court is the article seized from the accused and also the sample sent to the court is the sample taken by PW4 from the alleged contraband seized from the accused. These vital aspects have been omitted to be noticed by the court below and these have a material bearing on the determination of guilt of the accused. It is therefore contended that due to the above infirmities, conviction and sentence cannot stand.

9. The learned Public Prosecutor on the other hand contended that the evidence of PWs 3 and 4 are clear regarding the seizure, labelling etc., and there is no reason to believe that when the article is produced on the same day before court, there will be a difference in the articles produced. The mere fact that the entries in the court register and also in the property list do not contain the narration as contained in Ext.P1 mahazar, does not mean that the articles produced are different ones. It is pointed out that the accused have no case that the officers concerned had any axe to grind against them and there is no reason as to why they should falsely implicate the accused. The learned Public Prosecutor also pointed out that going by the evidence of PW5, sample was taken on the same day. It further confirms that the incident has occurred as alleged by the prosecution. The court below has analyzed the evidence in considerable detail and has come to the conclusion that the accused are guilty. There is no reason

as to why this Court should interfere with the conviction and sentence.

10. After having heard the learned counsel for the appellant and the learned Public Prosecutor and after having perused the records, there seems to be considerable force in the submission made by the learned counsel for the appellant.

11. True, PWs 3 and 4 speak about the detection, seizure etc.. The evidence of PWs 3 and 4 are to the effect that cans seized from the accused were sealed at the spot and labels containing the signature of the accused, witnesses and the officer concerned were affixed on them. Ext.P3 is the property list. Except for saying that the two Mos, which are sealed, there is no mention about the labelling at all. When PW4 was cross examined, certain inconsistencies were brought out in his evidence. Even assuming that the evidence of PWs 3 and 4 can be accepted, may be the court below can come to the conclusion that

there was a seizure. To some extent, it is fortified by Ext.P1 also. But the question still remains as to whether there is acceptable evidence to show that the articles produced before court are the articles seized from the accused and also whether the sampling was properly done.

12. Even though PW4 has stated that the two MOs were sealed and labelled, Ext.P3 does not say anything about the labels at all. To make it worse, Ext.P6, the entry in the court records, does not indicate that the two MOs produced were even sealed. The narration is as vague and general as can be. Therefore, the learned counsel for the appellant may be justified in his submission that one cannot take it for granted that the article produced before court is the article seized from the possession of the accused. In the absence of any mention of seal and label on the two MOs produced before court.

13. PW5, the thondi clerk of the court concerned simply says that he had taken the sample on the day on

which the articles were produced before court. Strangely enough, he says that the standing instruction that samples have to be taken on the very same day. No order is produced to that effect and the records produced namely, Ext.P6 does not indicate that the sample was taken on the same day and the procedure followed by him regarding the sampling. Except for the version given by PW5, there is no other supporting document. His evidence does not disclose that the two cans produced before court were sealed and waxed as claimed by PWs 3 and 4. One would have expected PW5 to prepare some contemporaneous document to show what he had done with regard to the sampling. There is no document forthcoming in that regard. To crown it all, if one is to believe PW5, he took the sample on 12.08.1999 and the records indicate that it was forwarded to the laboratory only on 15.10.1999. The inordinate delay remains unexplained. This casts suspicion about the claim made by PW5 regarding the sampling.

14. Therefore, it cannot be said that the prosecution has succeeded in establishing the case beyond reasonable doubt. This Court is unable to accept the finding of the court below that the accused were found guilty beyond reasonable doubt and that the prosecution has succeeded in establishing the case. The infirmities pointed out by this Court stare at the face of the prosecution and they remain unexplained. If that be so, the benefit of doubt certainly go to the accused.

For the above reason, this appeal is allowed. Conviction and sentence are set aside and the accused stand acquitted of the charges levelled against them. Their bail bond shall stand cancelled and they are set at liberty.

Sd/-
P.BHAVADASAN
JUDGE

ds

//True copy//

P.A. to Judge