

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

WEDNESDAY, THE 27TH DAY OF MAY 2015/6TH JYAISHTA, 1937

CRL.A.No. 1377 of 2005 ()

**AGAINST THE JUDGMENT IN CC 141/2000 of ADDL. SESSIONS COURT
FOR TRIAL OF ABKARI ACT CASES, NEYYATTINKARA DATED 14-06-2005**

APPELLANT(S)/ACCUSED::

**JOHNSON,
S/o. CHELLAPPAN NADAR,
VANDAAZHANNINNA PODUVAL LEKSHAM VEEDU,
KARUMKULAM DESOM, KARUMKULAM VILLAGE.**

BY ADV. SRI.BLAZE K.JOSE

RESPONDENT(S)/COMPLAINANT:

**THE STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
REPRESENTING CHARGE SHEET LAID BY
THE EXCISE INSPECTOR,
THIRUPURAM EXCISE RANGE.**

BY PUBLIC PROSECUTOR SRI.GITHESH R.

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 27-05-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

STK

P.D. RAJAN, J.

Crl. Appeal No.1377 of 2005

Dated this the 27th day of May, 2015

JUDGMENT

This appeal is preferred against the conviction and sentence in S.C.141/2000 of Additional Sessions Judge for the trial of Abkari Act cases Neyyattinkara for offence punishable under Section 55(a) of the Abkari Act.

2. The prosecution allegation was that on 18.05.1998 at 6.00 pm, the Excise Inspector, Thirupuram Excise Range was conducting patrol duty within his jurisdiction. When he reached at Koonanvila Junction, Kazhivoor desam, appellant was found in possession of a can with 4 litres of arrack on the southern side of the road, Koonanvila junction in front of the building of one Appukuttan Nadar. He was arrested from the spot itself and contraband articles were seized after preparing a mahazar. Reaching at the Excise Office, he registered the above crime and after investigation, laid charge before Judicial First Class Magistrate -III Neyyattinkara. Subsequently, the case was committed to Sessions Court Triruvananthapuram. From there the case was made over

to the Assistant Sessions Court, Neyyattinkara.

3. To prove the allegation, prosecution examined PW1 to PW4 and marked P1 to P3 and P3(a) and MO1 in evidence. The incriminating circumstances brought out in evidence were denied by the appellant while questioning him. After hearing under Section 232 of the Cr.P.C. appellant was given an opportunity to adduce defence evidence. He examined DW1. The trial court after hearing the appellant convicted him under Section 55(a) of the Abkari Act.

4. The learned counsel appearing for the appellant contended that there is no sampling as per the Act. The property clerk, PW4 sent the sample for chemical examination without the order of the Magistrate and without a request from the Detecting Officer. When there is no order from Magistrate, an illegal procedure was followed in this case. He relied the decision reported in ***Rajan V. State of Kerala 2013 (3) KLT 654.***

5. The evidence of PW3 shows that on 18.05.98 at 6.00 pm, he arrested the appellant with 4 litres of arrack

at Koonanvila Junction. The contraband articles were sealed at the place of occurrence itself after preparing Ext.P.1 mahazar. MO1 is the seized article. He did not take any sample from the place of occurrence. On the other hand, he sealed MO1 and produced before court after registering Ext.P2 crime and occurrence report. He filed request for sending MO1 to the chemical examination through court. PW4 is the property clerk of the Judicial First Class Magistrate-III Court, Neyyattinkara admitted that he received the thondi articles, Ext.P3(a) is the thondi list. PW4 took sample and forwarded the sample to the chemical examiner's laboratory, without obtaining any order from the Magistrate.

6. The legal effect of drawing sample without the order of the Magistrate has been explained by this court in

Rajan V. State of Kerala 2013 (3) KLT 654 (para 14).

“14. The next point argued by the learned senior counsel for the appellant is that, the contraband as such should have been produced before the court from where the samples could be drawn by the court and could have been sent for chemical analysis. It seems that there is no

provision as such enabling the court to draw samples in a case like this. It will not be a healthy practice to leave it to the ministerial staff of the court to draw samples from such contraband and forward it for chemical analysis. In such case also, it is easy to allege manipulations on their part. It should be feasible always to draw the sample in the presence of the accused as was done in the present case. In the present case, a sample was drawn in the presence of the appellant and the sample was produced before court along with the property list and the forwarding note. Ext.P9 certificate of chemical analysis rules out any manipulations or tampering with, of the sample. It has been clearly stated therein that the seal on the packet was intact and found tallying with the sample seal provided. Matters being so, any manipulation or tampering with the sample can clearly be ruled out. From the discussions made above, it can be concluded that there is absolutely nothing to interfere with the conviction passed by the court below."

7. The Public Prosecutor submitted that the Detecting Officer has put his seal in the kannas. That itself is sufficient to show that he has packed the contraband articles at the place of occurrence itself.

8. An Abkari Officer has the power to arrest offenders without a warrant if any person in any public thoroughfare or in an open place other than a dwelling house committing any offence punishable under the Abkari Act. It is the primary responsibility of the detecting officer to take sample from the seized contraband articles. He has also to ensure that the samples were sealed and produced before court without unnecessary delay. While sending sample to the chemical examiner, he also has to ensure that he has made a request for sending the sample taken from the contraband article in a tamper proof condition which also has to be recorded in his proceedings. Here PW3 in his cross-examination admitted that he has not taken any sample, which is violation of the benevolent provisions of the Abkari Act. Moreover, PW4 the property clerk, without obtaining any direction from the Magistrate, he himself took sample and forwarded it to the chemical examiner's lab.

9. The importance of sampling was discussed in the decision of ***Sasidharan V. State of Kerala 2007 (1)***

KLT 720, which reads as follows:

“9. It is true that the two independent attestors to Ext.P1 mahazar prepared by PW1 from the spot itself, have not been examined by the prosecution. One of those independent witnesses was no more and the other witness was not available. But the evidence of PWs 1 and 2 is quite credible to show that the accused was apprehended with a can allegedly containing contraband arrack. Notwithstanding the physical confirmation by PW1 of the contents in the can to be arrack by taste and smell the prosecution was not content with that identification. That is why PW4 filed the forwarding note before the court for taking sample and despatching the same for chemical examination. Indeed, the law also insists on such a course of action (see AIR 1967 SC 1550 - *State of A.P. v. Madiga Boosenna & Ors.* and 1970 KLT 427 *Muthan Ankannithu v. State of Kerala*). But there is no evidence to show that sample was taken from the can produced in court and that it was the said sample which was tested by the Chemical Examiner. The property list shows that the can which was received in court on 10.2.1998, was directed to be returned to the Excise Inspector himself for safe custody after taking sample therefrom. The said endorsement on the reverse of the property list does not prove that a sample was drawn from

the can which was produced in court. The thondy clerk, who was in charge of the M.O. produced in court, was not examined nor was any proceedings prepared and produced in this case to show that sampling was done in this case. Without the link evidence of actual sampling by the concerned clerk of the court by drawing sample from the can and sending the same in a sealed packet to the Chemical Examiner with a specimen seal sent separately for tamper proof despatch, the Prosecution cannot be held to have brought home the offence against the appellant. There is no evidence to show that the sample, which was analysed under Ext.P5 chemical report, was the sample taken from the can allegedly seized from the accused. When the sample changed hands before reaching the Chemical Examiner the Prosecution had to necessarily examine the various persons who were in custody of the sample to prove that while in their custody the seals on the sample had not been tampered with (see AIR 1980 SC 1314 *State of Rajasthan v. Daulat Ram and 1993 (2) KLT 550 SC - Valsala v. State of Kerala*). The prosecution had a duty to prove that it was the sample taken from the contraband liquor seized from the accused which had reached the hands of the Chemical Examiner in a fool proof condition. For this, there is no evidence.”

9. In this case, there is no evidence to show that Ext.P3, the chemical analysis report was the one and the same report of the sample, which was taken from the alleged MO1 seized from the accused. Unless and until such proof is produced by the prosecution, the case against the appellant will fail and he is entitled to get the benefit of doubt.

In the result, the conviction and sentence passed by the trial court under Section 55(a) of the Abkari Act is set aside and appellant is set at liberty.

This appeal is allowed.

STK

Sd/-

**P.D. RAJAN,
JUDGE**

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P.A. TO JUDGE