

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.UBAID

WEDNESDAY, THE 20TH DAY OF MAY 2015/30TH VAISAKHA, 1937

CRL.A.No. 1726 of 2005 ()

**AGAINST THE JUDGMENT IN SC 115/2000 of ADDL.S.C.-TRIAL OF ABKARI ACT
CASES, NEYYATTINKARA**

APPELLANT(S):

**VIJAYAMMA, D/O.KOCHUPARVATHI,
PANAVILATHUNDUTHATTU VEEDU, KAZHIVOOR DESOM
KANJIRAMKULAM VILLAGE, NEYYATTINKARA TALUK.**

BY ADV. SRI.BLAZE K.JOSE

RESPONDENT(S):

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

R1 BY ADV. PUBLIC PROSECUTOR SMT. P. MAYA

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 20-05-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

P.UBAID, J.

Crl. Appeal No. 1726 of 2005

Dated this the 20th day of May, 2015.

J U D G M E N T

The appellant herein challenges the conviction and sentence against her under Section 55 (a) of the Kerala Abkari Act. She faced prosecution before the Court of Session, Thiruvananthapuram in S.C No.115 of 2000 on the allegation that on 2.2.1998 she was found possessing 3 litres of arrack in a plastic can. She was arrested by the Excise Inspector on the spot on detection, and the plastic can carried by her, containing arrack, was also seized as per mahazar. On the same day the properties was produced in court along with the Crime and Occurrence report. After comply with the procedure prescribed under the law, the learned Judicial First Class Magistrate III, Neyyattinkara committed the case to the Court of Session, from where it was made over to the learned Additional Sessions Judge, Neyyattinkara. The accused pleaded not guilty to the charge framed against her under

Section 55(a) of the Kerala Abkari Act. The prosecution examined 4 witnesses including the Excise Inspector who detected the offence, and also marked Exts.P1 to P5 documents and the MO1 plastic can, alleged to have been seized from the hands of the accused. When examined under Section 313 Cr.P.C also, the accused denied the incriminating circumstances and maintained a stand of total denial. On an appreciation of the evidence given by the prosecution, the learned trial Judge found the accused guilty under Section 55 (a) of the Kerala Abkari Act. On conviction thereunder she was sentenced to undergo rigorous imprisonment for a period of two years and to pay a fine of ₹ 1,00,000/- by judgment dated 1.9.2005. Aggrieved by the conviction and sentence the accused has come up in appeal.

2. The accused / appellant challenges the conviction on two legal grounds. One is that investigation was conducted by the very same officer who detected the offence, and he also made complaint before the court. The second ground is that the evidence adduced by the prosecution itself shows that the material object was definitely tampered with during the process. The dispute is regarding the identity of the plastic

can seized from the hands of the accused. The definite contention raised by the accused is that MO1 produced in court is not the plastic can seized from her hands, and she also contends that there was clear tampering with the properties during the trial process.

3. Of course, PW3 the Excise Inspector and PW1 the Preventive officer have given evidence regarding the process of detection including the arrest of the accused, and seizure of a plastic can. The dispute is not on these aspects. The accused is definite that MO1 produced in court is not in fact the plastic can seized from her hands. MO1 is a black plastic can of 5 litres capacity. But the lid of the can is white in colour. The prosecution has no explanation for this. It came out in evidence that during the trial process the sealed can produced in court was once opened by PW4. It is not known what was his authority to open a sealed can. In such a circumstance where there is definite evidence showing tampering with the property produced in court the evidence given by the detective officer regarding detection, or the chemical analysis report, will not in any manner help the prosecution.

4. The trial court judgment itself shows that during trial PW4, the Thondy clerk, had once opened the MO1 plastic can. The evidence of PW3 and PW1 (the Excise Inspector and the Preventive Officer) is that after collecting necessary sample, the plastic can containing the remaining quantity was properly sealed. When a sealed can is produced in court, it must remain there as a sealed can till conclusion of trial if not opened by the judge as part of trial. It is quiet strange that the trial court has justified the action of PW4 in tampering with the seal, and opening the sealed plastic can. Whatever evidence is there regarding the process of detection or collection of sample, nothing will help the prosecution when there is definite evidence that the sealed plastic can produced in court was later opened by the Thondy clerk. Much probe or enquiry is not required to find that there was tampering with the property, the benefit of which must necessarily go to the accused. I find that the prosecution has failed to prove the case beyond reasonable doubt.

5. It is not known who authorized PW4 to open the sealed plastic can. In such a situation it is difficult to find that the liquid contained in the sample received in the laboratory

was collected from the MO1 plastic can. Thus as regards identity of the sample and the plastic can the appellant has a genuine case in appeal, and there is much doubt regarding the genuineness of the MO1 property produced in court. I am inclined to grant this benefit to the accused, and thus grant her an acquittal on the benefit of doubt. The prosecution case is that the accused was found possessing arrack. Possession of arrack is prohibited under Section 8(1) of the Kerala Abkari Act, and it is made specifically punishable under Section 8(2) of the Kerala Abkari Act. The complaint should have been brought under Section 8(2) of the Kerala Abkari Act, the charge also should have been framed by the court below under Section 8(2) of the Kerala Abkari Act, and the conviction also must have been under Section 8(2) of the Kerala Abkari Act. This probably, escaped the attention of the learned trial judge. In stead of framing a proper charge under Section 8(2) of the Kerala Abkari Act the trial court wrongly framed a charge under Section 55(a) of the Kerala Abkari Act. Anyway, the accused is entitled for acquittal on the benefit of doubt.

In the result this appeal is allowed. The conviction and

sentence against the appellant under Section 55(a) of the Kerala Abkari Act in SC 115 of 2000 of the court below will stand set aside. The accused / appellant is found not guilty of the said offence, and she is acquitted of the said offence in appeal under Section 386(b)(i) Cr.P.C. The bail bond, if any, executed by the accused will stand discharged.

sd/-
P.UBAID,
JUDGE

sab