

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

THURSDAY, THE 13TH DAY OF AUGUST 2015/22ND SRAVANA, 1937

CRL.A.No. 1733 of 2005 ()

**AGAINST THE JUDGMENT IN SC 658/2001 of ADDL.DISTRICT COURT (ADHOC)-III,
THALASSERY DATED 30-08-2005**

APPELLANT(S)/ACCUSED 1 & 2::

**1. KORAKKALAYIL BIJU
S/O.JOHN AYYANKUNNU,
AMSOM DESOM,
PALATHUM KADAVU,
(ACCUSED NO.1).**

**2. T. JOSE,
S/O. THOMAS,
VETTIKKATTU HOUSE,
AYYANKUNNU AMSOM
KACHERIKADAVU.
(ACCUSED NO.2).**

**BY ADVS.SRI.VARGHESE K. PAUL
SRI.H.BADRUDDIN
SRI.C.A.JOSEPH**

RESPONDENT(S)/COMPLAINANT/STATE::

**1. SUB INSPECTOR OF POLICE
S.H.O. PANNOOR,
THALASSERY, KANNUR.**

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

R1 TO R2 BY PUBLIC PROSECUTOR SMT.SAREENA GEORGE

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 13-08-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

STK

P.D. RAJAN, J.

Crl. Appeal No.1733 of 2005

Dated this the 13th day of August, 2015

JUDGMENT

The appellant is the accused in S.C.658/2001 on the file of the Additional Sessions Judge, Adhoc-III, Thalassery challenges the judgment of conviction for offence under Section 55(a) of the Abkari Act (hereinafter referred to as the 'Act'). The accused was convicted and sentenced to imprisonment for one year and to pay a fine of rupees One lakh under Section 55(a) of the Act, in default, simple imprisonment for 6 months.

2. The facts necessary for the indictment were that on 12.8.99, at 8.45 pm. first accused was driving a vehicle No.PY-01H/897 along the Public Road, when they reached at Ponniyam palam-Kathirur road, the Sub Inspector of Police, Panoor inspected that vehicle and found transporting 3200 packets of Karnataka made arrack each contained 100 ml. The accused were arrested and reaching at the police station, he registered a crime. After investigation, he laid charge before court. The prosecution examined PW1 to PW5 and marked Ext.P1 to

Ext.P8 and admitted material objects MO1 to MO9. The incriminating articles brought out in evidence were denied by the appellant while questioning them. They did not adduce any defence evidence. The trial court after analyzing the oral and documentary evidence, convicted the appellants.

3. The learned counsel appearing for the appellant contended that there is no proper sampling of the seized articles at the place of occurrence. The arrest was recorded at the place of occurrence and the crime was noticed in the arrest memo created a doubt in the credibility of the arrest. There is inordinate delay in producing the seized articles before court. When there is no proper identity of the accused, they are entitled to get the benefit of doubt.

4. In this context, I have considered whether Karnataka made arrack was seized from the vehicle as alleged by the prosecution. The evidence of PW1, the detecting officer shows that on 12.08.99, at 8.30 pm., while he was conducting vehicle inspection on the

Ponniam Palam-Kathirur road, at that time, the vehicle PY-01H/897 came from the Kathiroom side, he stopped the vehicle, inspected it, he found 8 jute bags in it and while opening the bag, detected small packets of Karnataka made arrack in it, each contained 100 ml. He arrested the accused and took sample at the place of occurrence itself. Four packets each from each bag was taken as sample and sealed at the place of occurrence, after obtaining the signature of the accused and other witnesses. Reaching at the police station, he registered a crime. Ext.P1 is the seizure mahazar. Ext.P2 is the FIR in Crime 162/99. Ext.P3 is the arrest memo. Ext.P4 is the property list. Ext.P5 is the scene mahazar. MO1 to MO6 are the bags which contained the arrack packets. He forwarded the seized article before court as per property list.

5. The independent witnesses present there attested Ext.P1 mahazar. PW2 admitted his signature in Ext.P1 but he deposed that he has not seen the arrest and seizure. PW3 is the attester of Ext.P5 scene mahazar. Analyzing the evidence of PW1 to PW3 it is clear that, PW1 seized

the articles from the jeep as alleged and the seized articles were produced before the court as per Ext.P4 property list.

6. The investigation was conducted by PW4. He prepared Ext.P6 forwarding note for sending the sample to the chemical examiner's laboratory. But in Ext.P6, sample seals were not obtained. Ext.P7, chemical analysis report shows that the seals were intact or tallied with the sample seal provided. As per Ext.P7 chemical examination report, ethyl alcohol was detected in all samples at the average of 28.7% and above. PW5 prepared Ext.P7 scene mahazar and conducted part of the investigation. A close scrutiny of the evidence of these witnesses shows that there is no proper sampling of the articles for believing the alleged seizure as stated by PW1. It is the primary responsibility of the prosecution to prove the case beyond reasonable doubt. The impact of non-preparation of forwarding note and affixing sample seal in forwarding note was discussed by this court in **Joseph V. State of Kerala (2009 (4) KHC 537)**, it

was held that:

“No request or forwarding note either produced or marked to indicate that a request was made to the Magistrate to send the sample bottle to the chemical examiner for analysis. In the absence of any forwarding note or requisition, and in the absence of any explanation as to how the Magistrate forwarded sample to the chemical examiner, evidence adduced by the prosecution in that regard cannot be relied upon”

7. The infirmity that I have noticed in this case is that in Ext.P6 forwarding note, sample seal was not affixed by the Investigating Officer. There was a forwarding note to send the sample bottle to the chemical examiners laboratory. Ext.P7 chemical examiners report was relied by the prosecution to show that the sample bottle was property sealed and forwarded to the chemical examiners lab. Prosecution has to prove that the sample was taken from the huge quantity of arrack, seal was affixed and sample seal was provided properly in order to ensure that sample drawn was the same sample from the huge quantity of arrack. When sample seal is not affixed

in Ext.P6 forwarding note, accused is entitled to get the benefit of doubt.

8. In **Ravi V. State of Kerala (2011 (3) KLT 353)** this court ensured the procedure for sampling and the investigating officer or the seizing officer should ensure that the seized articles were properly sealed and the forwarding it before court to ensure the credibility of the seizure. In **Ravi V. State of Kerala (2011 (3) KLT 353)**, it is held that:

“If so, it cannot be assumed that the property was in the safe custody of PW4 until their production before Court after 16 days. There is the possibility that the properties would have been tampered with. The prosecution, in a case of this nature can succeed only if it is shown that the contraband liquor which was allegedly seized from the accused ultimately reached the hands of the Chemical Examiner by charge of hands in a tamper-proof condition.”

A perusal of the evidence in this case shows that, PW1 failed to comply the directions, therefore, that

benefit is extended to the appellant. In the light of the legal infirmities, the conviction and sentence under Section 55(a) of the Abkari Act passed by the trial court is set aside and the appellants are acquitted and accordingly this appeal is allowed.

STK

Sd/-
P.D. RAJAN,
JUDGE

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P.A. TO JUDGE