

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

SATURDAY, THE 21ST DAY OF NOVEMBER 2015/30TH KARTHIKA, 1937

CRL.A.No. 2031 of 2006 ()

**AGAINST THE JUDGMENT IN SC 237/2004 of ADDITIONAL SESSIONS COURT
(ADHOC)-II, ERNAKULAM DATED 29-09-2006**

IN CP 26/2003 OF JUDICIAL FIRST CLASS MAGISTRATE-I, MUVATUPUZHA

APPELLANT(S)/ACCUSED:

**ULAHANNAN, AGED 60,
S/O.THOMMAN, KUZHIKKATTIL VEEDU, THOTTUR DESOM
KAIPPATTUR.**

BY ADV. SRI.C.P.UDAYABHANU

RESPONDENT(S)/COMPLAINANT:

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

BY PUBLIC PROSECUTOR SMT. S. HYMA

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 21-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 2031 of 2006

Dated this the 21st day of November, 2015

J U D G M E N T

The accused was prosecuted for the offences punishable under Sections 55(a), (i) and 58 of the Kerala Abkari Act. He was found not guilty of the offences punishable under Sections 55(a) & (i), but was found guilty of the offence punishable under Section 58 of the Abkari Act. Consequently, he was convicted for the said offence and sentenced to suffer rigorous imprisonment for one year and to pay a fine of ₹1 lakh with a default clause of simple imprisonment for a further period of six months. Set off as per law was allowed.

2. The incident which gave rise to the case occurred on 12.12.1998. On that day, PW1, the Excise Inspector of Piravam Excise Range, at about 12.30 in the noon, had gone on routine patrol duty. When he reached near the Piravom Bus Stand, a person, who did not wish to disclose his name,

informed him that near the Co-operative Departmental Store, a person was engaged in the sale of illicit liquor. PW1 would claim that in order to ascertain the truth of that allegation, he sent a guard by name Rajan, who informed him that the information was true. They reached the place of incident and the accused was standing there with a big shopper bag. On examination of the big shopper bag, it was found to contain 15 bottles of 180ml capacity and 5 bottles of 375ml capacity and in all the bottles, there were full of coloured liquid. By taste and smell, the liquid was identified as illicit liquor. The accused was arrested as per Ext.P1 arrest memo. He claims to have opened all the bottles and convinced that all the bottles contained illicit liquor and then sealed all the bottles. He prepared Ext.P3 mahazar. He also took into custody the big shopper and the newspaper in which the bottles were wrapped and thereafter, with the accused, the contraband articles and the documents returned to the Station. He registered Crime No. 14/1998 as

per Ext.P4 occurrence report. The accused and the documents were produced before court. The seized articles were produced before court on 14.12.1998 as per Ext.P5 property list. Ext.P6 is the report showing the specimen seal. Ext.P8 is the forwarding note. Investigation of the case was done by PW4. He recorded statements of witnesses, obtained the Chemical Analysis Report Ext.P9, completed investigation and laid charge before court.

3. The court before which the final report was laid, took cognizance of the offence and finding the offence to be exclusively triable by a Court of Sessions, committed the case to Sessions Court, Ernakulam under Section 209 of Cr.P.C. after following the necessary procedures. The said court made over the case to Additional Sessions Court (Adhoc-II), Ernakulam for trial and disposal.

4. The latter court, on receipt of records and appearance of the accused before the said court, framed charge for the offences already made mention of.

5. To the charge the accused pleaded not guilty and claimed to be tried. The prosecution therefore had PWs 1 to 4 examined and had Exts.P1 to P9 marked. M.O.s 1 to 4 were got identified and marked.

6. After the close of prosecution evidence, the accused was questioned under Section 313 Cr.P.C. He denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent.

7. Finding that he could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. He chose to adduce no evidence.

8. On appreciation of the evidence, the court below found the evidence of PWs 1 and 2 to be convincing enough regarding the seizure and also the preparation of documents and the involvement of the accused and held the accused guilty of the offence under Section 58 of the Act. Conviction and sentence as already mentioned followed.

9. Assailing the conviction and sentence, the learned counsel appearing for the appellant contended that the conviction under Section 58 of the Abkari Act is misconceived since the ingredients necessary to attract that provision are totally absent in the case on hand. There is neither pleadings nor evidence to show the requirements that has been met for charging an offence under Section 58 of the Abkari Act. Accordingly, it is contended that the conviction cannot stand. It is also contended by the learned counsel that there is no evidence of any sample having been taken by any one of the officers who dealt with the matter and it is not known which bottle was sent for chemical analysis. True, the sample seal was produced independently. But that is not sufficient unless it is shown that the specific sample was taken and it was sent for chemical analysis. There is nothing to show as of now that the sample sent for chemical analysis is the sample taken from among the contraband article seized from the

possession of the accused.

10. The learned Public Prosecutor was unable to repel the contentions made by the appellant. However, it was pointed out that the evidence of PWs 1 and 2 are clear to the effect that the accused was engaged in the nefarious activity and that contraband articles were seized from his possession. Even assuming that there are certain technical infirmities, the learned Public Prosecutor pointed out that that shall not stay in the way of holding the accused guilty. In short, the contention is that no grounds are made out to interfere with the conviction and sentence.

11. The evidence regarding the detection of the offence remains confined to the testimony of PWs 1 and 2, among them, PW1 was the Excise Inspector and PW2 was the Preventive Officer. Both PWs 1 and 2 along with other officers had gone on routine patrol duty and both of them say that they received information that the accused is engaged in the sale of illicit liquor near a Co-operative

Departmental Store. PW1 would say that in order to verify the veracity of the information so received by him, he deputed a guard by name Rajan to enquire. Rajan returned and told PW1 that the information was correct. The team proceeded to the spot. When they reached the place, they found a person standing on the southern side of the Departmental Store. He had big shopper bag with him. PW1 seized the bag and examined its contents. It was found to contain 15 bottles of 180ml capacity containing liquid in it. He also found 5 bottles having a capacity of 375ml liquid in it. On examining the contents by opening the bottles, it was revealed that it was illicit liquor. PW1 would say that his personal seal was affixed on all the bottles and all the bottles were labelled. He would also say that the big shopper and the newspapers which were used for wrapping the bottles were also seized. They were also sealed and labelled.

12. The learned counsel appearing for the appellant is justified in his submission that there is no mention in the evidence of PWs 1 and 2 that any sample as such was taken by the Investigating Officer namely, PW1. He also referred to the property list namely, Ext.P5 and pointed out that there is also no mention regarding any sample having been produced before court. It is therefore not known as to who actually had taken the sample which was sent for chemical analysis. Relying on the decision of this Court, the learned counsel pointed out that in such circumstances, it is absolutely necessary to show as to who had taken the sample.

13. There is much force in the above contention. It is not seen that any sample as such has been taken by anybody and there is no evidence to show that if at all any sample was taken, it was taken by whom and from where. Of course, the sample seal is produced independently. But the property list does not show the production of any sample

before court which is to be sent for chemical analysis. In the forwarding note, namely, Ext.P8, all that is stated is that one bottle is being forwarded for being sent for chemical examination. As to which of the bottle was being sent and who had taken it as a sample are conspicuously absent in the evidence. Neither PW1 nor PW2 nor the officer who laid the charge is able to pinpoint as to the particular bottle which formed a part of the contraband article seized from the possession of the accused was sent as sample. There is absolute want of evidence to show that there was proper sampling done and a sample as is known to law was sent for chemical examination.

14. Thus, there is no evidence to show that the articles seized from the possession of the accused is a prohibited article and that he is liable for the same.

15. The above finding is sufficient for an acquittal. However, it will be only appropriate to consider whether, if the allegations are true, the offence under Section 58 can be

attracted. In this connection, it will be useful to refer to the decision reported in **Josekutty v. State of Kerala** (2013 (1) KHC 241) wherein an identical question was considered by this Court. This Court had occasion to hold that in order to attract Section 58 of the Abkari Act, the necessary ingredients which are mentioned in the Section will have to be pleaded and established by the prosecution. The distinguishing feature of Section 58 is that the possession of the contraband article must be with the knowledge of the fact that the liquor was unlawfully imported, transported or manufactured or knowing that the duty tax payable under the Act has not been paid. It is incumbent on the part of the prosecution to establish anyone of those aspects to attract Section 58 of the Abkari Act. There is neither any evidence nor any pleadings in this case in that regard. Therefore, the conviction under Section 58 has necessarily to go.

16. Whatever that be, in the light of the fact that no proper sampling has been done and there is no evidence of

proper sample has been sent for chemical analysis, the conviction cannot stand.

For the above reasons, this appeal is allowed. The conviction and sentence passed by the court below are set aside and the accused stands acquitted of all charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

Sd/-
P.BHAVADASAN
JUDGE

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P.A. to Judge