

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

THURSDAY, THE 18TH DAY OF JUNE 2015/28TH JYAISHTA, 1937

CRL.A.No. 1885 of 2005 ()

**AGAINST THE JUDGMENT IN SC 602/2004 of ADDL.SESIONS COURT (ADHOC)-II,
THODUPUZHA**

APPELLANT(S):

**THOMAS, S/O. THOMMAN,
ILLIKKAMURIYIL VEEDU, KALLAR 8TH ACRE KARA
ANAVIRATTY VILLAGE.**

**BY ADVS.SRI.S.V.BALAKRISHNA IYER (SR.)
SRI.K.JAYAKUMAR (SR.)
SRI.P.B.KRISHNAN
SRI.HARISH R. MENON
SRI.R.SURAJ KUMAR**

RESPONDENT(S):

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

BY ADV. PUBLIC PROSECUTOR SMT.SEENA RAMAKRISHNAN

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 18-06-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

STK

P.D. RAJAN, J.

Crl. A. No.1885 of 2005

Dated this the 18th day of June, 2015

JUDGMENT

This appeal is preferred against the judgment in S.C.602 of 2004 of Additional Sessions Judge (Adhoc)-II, Thodupuzha. Appellant was convicted under Section 55(a) of the Abkari Act and sentenced to imprisonment for one year and a fine of rupees One lakh, in default of fine, rigorous imprisonment for 3 months.

2. The prosecution allegation was that on 23.12.2001, the Sub Inspector of Police, Adimaly got information that the appellant was conducting sale of foreign liquor in his shop. On the basis of that information, he arrived at the place of occurrence at 12.30 pm, after preparing a search memorandum and forwarded it to the court, he searched the shop and seized four bottles of foreign liquor containing 750 ml. The appellant was arrested from the place of occurrence, reaching at the Police Station, he registered a crime No.384/01. After completing investigation, he laid charge before the

Judicial First Class Magistrate, Adimaly from there it was committed to Sessions Court, Thodupuzha for trial.

3. In the lower court, prosecution examined PW1 to PW5 and marked Ext.P1 to P9 and admitted MO1 and MO2 as material objects in evidence. The incriminating circumstances brought out in evidence were denied by the appellant while questioning him under Section 313 Cr.P.C. The appellant was heard under 232 Cr.P.C. and called upon to enter on his defence. He did not adduce any defence evidence. The trial court after analyzing the evidence, convicted the appellant.

4. The learned counsel appearing for the appellant contended that there is inordinate delay in producing the seized article before court. MO1 series articles were not sealed at the place of occurrence and no sample was taken at the time of seizure from each bottle. This will create a doubt in the alleged seizure and the appellant is entitled to get the benefit of doubt.

5. The learned Public Prosecutor admitted that the seized articles were produced only on 16.03.02 and it was

properly explained by the detecting officer. The sample need not be taken from each bottle, since the contents in the four bottles were in a sealed condition, purchased from Beverages Corporation. No infirmity attached to the seizure.

6. The possession of Indian Made Foreign Liquor was disputed by the appellant in this case. It is the case of the detecting officer that on 23.12.01 at 12.30 pm, he got information that the appellant was selling liquor in his shop and on the basis of that information, PW1 proceeded to the place of occurrence after preparing a search memorandum and conducted the search in the shop of the appellant. He detected 4 bottles of brandy each containing 750 ml in a sealed condition, which was purchased from the beverages Corporation. PW1 arrested him. One bottle was sealed at the place of occurrence and produced it before court and remaining bottles were taken into custody after preparing Ext.P1 mahazar. PW1 and PW5 who are the mahazar witnesses, attested Ext.P1, did not support the seizure, but admitted the signature in

Ext.P1 seizure mahazar. The fact that the independent witness turned hostile is not a ground to discard the prosecution evidence and court cannot throw out the prosecution case on that ground alone. The court has then scrutinize the evidence far more rigorously.

7. The next point to be considered is whether all bottles were sealed at the place of seizure or the sample bottle alone sealed. The appellant contended that one sample bottle was sealed and packed from the place of occurrence at the time of preparing Ext.P1 seizure mahazar. The remaining bottles were not sealed by PW3. At the time of seizure, four bottles were sealed with the seal of Beverages Corporation named as 'Shivas Fine Brandy' in MO2 big shopper. One bottle was sealed and taken as sample. The learned Public Prosecutor submitted that when all bottles are sealed by the Beverages Corporation itself and in the same pattern, all bottles need not be sealed at the place of occurrence. The four bottles having the capacity of 750 ml and one 750 ml bottle was taken as sample and sealed. It is true that one

sample alone was drawn from the four bottles and sealed and labelled. When bottles are sealed containing same capacity of 750 ml., the prosecution need not take samples from each four bottles since they are already in a sealed condition. But they have to seize the entire bottles and seal such articles together and affix their seal with the seal of the officer in-charge of the Police Station. Therefore, this court in **Kelukutty V. State of Kerala 2009(4) KLT 286** held that;

“When similarly labelled and sealed bottles purported to contain same type of article are seized, sample need not be drawn from each and every bottle.”

From the above contention, I am of the opinion that prosecution need not take samples from each bottle and one sample from seized article is sufficient.

8. Now the question is whether there is any delay in producing the articles before court. According to PW3, on 23.12.01 while conducting patrol duty, he seized MO1 and MO2. Ext.P8 is the search memorandum. Ext.P1 is the seizure mahazar. The seized articles were produced

before court only on 16.03.2002. There is no proper explanation from the side of PW3 with regard to the delay. PW3 admitted that the seized article were in his custody and the seizure was during Christmas time, he could not produce these articles before court. Even though he stated so, that explanation is not sufficient since the seized articles were not sealed and affixed his signature as stipulated under Section 53 of the Abkari Act.

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.”

Nothing has been stated by PW3 that he has kept the

seized article in his safe custody until its production before court after 83 days. Since it was not in a sealed condition, there is possibility that the properties would have been tampered with. In such a situation, if the seized article was not in sealed condition, the primary responsibility of the prosecution is to produce all the article before court without unnecessary delay. Therefore, MO1 series which was alleged as seized from the accused was kept not in a fool-proof condition in the custody of the Sub Inspector of Police, Adimaly, the appellant is entitled to get the benefit of doubt.

9. In this backdrop, I have considered whether the possession of 4 bottles of Indian Made Foreign Liquor was proved in the custody of the appellant was proved. PW4, the Secretary of the Pallivasal Grama Panchayath deposed that he issued Ext.P9 certificate stating the ownership of the building. PW2 deposed that he is the owner of the building in which one room was given to the appellant for running a tea shop and Ext.P3 is the rent agreement. In cross examination, he admitted that one

room was given to another person. But no evidence has been adduced by PW3 that the appellant was selling foreign liquor in his shop. No measurement glass was seized from there. During 2001, appellant was permitted to keep 3 litres of Indian made foreign liquor in his possession. When there is no evidence with regard to sale of foreign liquor, no offence under Section 55(a) of the Abkari Act will be attracted.

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

This appeal is allowed

STK

Sd/-
P.D. RAJAN,
JUDGE

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P.A. TO JUDGE