

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 18TH DAY OF DECEMBER 2015/27TH AGRAHAYANA, 1937

CRL.A.No. 1598 of 2007 ()

**AGAINST THE JUDGMENT IN SC 1058/2001 of ADDITIONAL SESSIONS COURT
-TRIAL OF ABKARI ACT CASES, NEYYATTINKARA DATED 23-08-2007**

APPELLANT(S)/ACCUSED:

**MANIYAN S/O. PADMANABHAN,
MEKKEMOONGACHIRA VEEDU, PACHALLOOR DESOM
THIRUVALLOM VILLAGE, THIRUVANANTHAPURAM VILLAGE.**

BY ADV. SRI.R.T.PRADEEP

RESPONDENT(S)/COMPLAINANT:

**THE STATE OF KERALA REPRESENTED BY
DIRECTOR GENERAL OF PROSECUTION, HIGH COURT OF, KERALA
ERNAKULAM.**

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 18-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

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P.BHAVADASAN, J.

Crl.A. No. 1598 of 2007

Dated this the 18th day of December, 2015

J U D G M E N T

The accused was prosecuted for the offence punishable under Section 58 of the Abkari Act. He was found guilty. He was therefore convicted and sentenced to suffer rigorous imprisonment for a period of two years and to pay a fine of ₹1 lakh with a default clause of rigorous imprisonment for a further period of three months.

2. The incident which gave rise to this case occurred on 26.08.1998. PW4, then Excise Circle Inspector of Excise Enforcement and Anti Narcotic Special Squad, along with PW3 and two other officers were on patrol duty. When they reached near Sri. Panathura Subrahmanyam Temple, they happened to see a person carrying a sack. Feeling suspicious, he was approached and the sack was seized. It was opened and then it was found that it contained 6 bottles of 750ml capacity containing liquids in each of the bottle.

By taste and smell, the contents were identified as arrack. He was arrested on the spot. All the 6 bottles were seized and sealed and labelled. The labels contained the signatures of PW4, the accused and the two independent witnesses. The sack in which the bottles were kept, was also seized and that too was sealed and labelled and that label also contained the signatures of the accused, PW4 and the two independent witnesses. Ext.P4 is the mahazar prepared on the spot. PW4 would say that they then returned to the Station along with the accused, contraband articles and the records and entrusted them to the Excise Officer, Thiruvananthapuram. PW5 was the then Excise Inspector attached to the Thiruvananthapuram Excise Office. Mahazar Ext.P4, the articles seized and the accused were produced before him and he received them. On that basis, he prepared Ext.P6 occurrence report. He had the accused and the articles produced before court. Ext.P7 is the remand report. Ext.P8 is the property list. He requested the court to

take samples and forwarded it to laboratory and after the court having done so, he received Ext.P9 Chemical Analysis Report. Investigation of the case was taken up by PW6. He recorded the statements of witnesses, verified the records and filed final report 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, Thiruvananthapuram, under Section 209 of Cr.P.C. after following the necessary procedures. The said court made over the case to Additional Sessions Court for the trial of Abkari Act Cases, Neyyattinkara, 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 offence punishable under Section 58 of the Abkari Act.

5. To the charge the accused pleaded not guilty and claimed to be tried. The prosecution therefore had PWs 1 to 8 examined and had Exts.P1 to P10 marked. MOs 1 and 2 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 had examined DWs 1 to 3.

8. The court below, based on the evidence of PWs 3, 4 and 7 taken along with the contemporaneous document namely, Ext.P4 mahazar, found that the prosecution has succeeded in establishing the case against the accused and held him guilty. Conviction and sentence followed.

9. Assailing the conviction, learned counsel for the appellant contended that even though the mahazar says

that the 6 bottles seized from the possession of the accused were sealed at the spot. The property list produced through which the property was produced before court and the occurrence report do not show that the bottles produced in the court were sealed. A reasonable doubt is created regarding the articles that is seized and the articles that is produced before court. There is no explanation offered by any witnesses in this regard. As regards sampling, even though PW4 says that he had made a request to the court to take the samples, no such document is seen among the files. PW7 makes tall claims regarding the order of taking sample etc.. But there is no document produced to show that he was either asked to take the samples or he was directed to take samples. Ext.P10 is relied on by the prosecution, but that only shows that the samples were received for transporting it to the laboratory and that does not anywhere show that there was an order issued to PW7 to take samples in accordance with law. The sample seal

stated by PW7 is the seal of the court which would indicate that the sample sent for chemical analysis contained the court seal. It is not specifically stated in Ext.P9 that the seal that was found on the sample bottle sent was that of the court. It only says that seal tallied with the sample seal. These aspects have been overlooked by the court below and the court below has acted mechanically in convicting the accused.

10. The learned Public Prosecutor on the other hand sought to justify the conviction by pointing out that the evidence of PWs 3 and 4 are sufficient to reach a conclusion that the accused was in possession of the contraband article. May be that the property list and the occurrence report may not show that the bottles produced before court are sealed, but the mahazar Ext.P4 says so. Therefore, there is no need to doubt its veracity. Further, PW7 has given convincing evidence regarding the samples taken and the procedure followed by him. The court below has chosen

to accept all these items of the evidence and has come to the right conclusion that the offence has been made out. There are no grounds to interfere.

11. After having heard the learned counsel for the appellant and the learned Public Prosecutor and after having perused the records, it is seen that the evidence regarding detection is confined to the oral testimony of PWs 3 and 4, among whom, PW4 is the Excise Inspector and PW3 is the junior officer. Of course, they do say about having seen the accused on the way and the seizure etc.. Both of them however, say that the 6 bottles seized from the possession of the accused were sealed at the spot. Their evidence is clear to the effect that no samples were taken by them from the spot. In the mahazar, Ext.P4 does mention about the seals having been affixed and the labels affixed on the samples as well as the balance contraband articles. But strangely enough, the occurrence report which is filed before court and also the list of property simply say that 6 bottles

of arrack were produced and there is no mention of any sealing or labelling seen on the bottle at that point of time. It was that property that was received by court.

12. Then the question of sampling arises. As already mentioned, the Excise Officers have no case that they had taken samples. Then samples must have been taken through court. PW7, the Thondi Clerk says that as per the direction issued by the Judicial First Class Magistrate Court concerned, he had taken samples. First of all, no such order is seen produced. One is not in the know as to when the sample was taken and from where it was taken. It is also significant to notice that even though the detection of the offence was on 26.08.1998, the contraband articles seized were produced before court only on 31.08.1998 as to where the articles were kept during this interim period, there is no evidence at all.

13. It is in this context, one will have to view the claim of PW7 that he acted as per the orders of the Judicial First

Class Magistrate. The extract of the thondi register produced as Ext.P10, does not show anything of that sort. His authority is therefore under doubt.

14. Further, as rightly pointed out by the learned counsel for the appellant, the sample seal sent by the court is the court seal. But Ext.P9 Chemical Analysis Report does not show that the seal found on the samples was that of the court. The above aspects have not been noticed by the court below and a reasonable doubt is created in the mind of the court regarding the contraband produced before the court and also regarding the samples taken. The Excise Officers say that they produced the sample seal. As to what happened to that sample seal, there is no evidence.

For the above reasons, this Court is unable to accept the finding of the court below that the prosecution has established the case beyond reasonable doubt against the accused. Hence, 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