

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

FRIDAY, THE 26TH DAY OF JUNE 2015/5TH ASHADHA, 1937

CRL.A.No. 248 of 2015 ()

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AGAINST THE JUDGMENT IN SC 330/2013 of COURT OF II<sup>nd</sup> ADDITIONAL  
SESSIONS JUDGE, THODUPUZHA DATED 27-12-2014  
(CP 15/2013 OF COURT OF JUDICIAL FIRST CLASS MAGISTRATE, ADIMALI)

APPELLANT:

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APPU, S/O. MANIKYAM, C.NO.1712,  
CENTRAL PRISON, VIYYUR, THRISSUR.

BY ADV. SRI.VIPIN NARAYAN (STATE BRIEF)

RESPONDENT:

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STATE OF KERALA

BY PUBLIC PROSECUTOR SMT.MAYA.P.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON  
26-06-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**C.T.RAVIKUMAR, J.**

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Crl.A.No.248 of 2015  
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Dated 26<sup>th</sup> June, 2015

**JUDGMENT**

This appeal is directed against the judgment of conviction passed by the Court of II Additional Sessions Judge, Thodupuzha in S.C.No.330 of 2013. The appellant herein was the sole accused therein and he was tried for the offence punishable under Section 55(g) of the Abkari Act . He was convicted and sentenced to undergo simple imprisonment for one year and to pay fine of ₹ 1,00,000/-. In default of payment of fine he was ordered to undergo simple imprisonment for three months. The case of the prosecution was that on 18.10.2012 on obtaining a secret information regarding the manufacturing of illicit liquor in the forest area near Kattamudi Tribal Settlement Colony in Mannamkandam Village PW3 along with his party went inside the forest area and found the accused in possession of 85 litres of wash and the implements for illicit preparation of arrack. Huge quantity of wash was found kept in two barrels and after taking a sample of wash from one of the barrels the balance of wash were destroyed on spot. The sample and a 100 litre capacity of blue colour barrel marked as `A', 30 litre capacity of Aluminium pot marked as

`B', 20 litre capacity of Aluminium vessel marked as `C', Illichatty and a steal basin having capacity of 1½ litre marked as `E' (MO1 to MO5) were also seized from the spot under Ext.P1 mahazar. Under Ext.P5 arrest memo the appellant was arrested from the spot. The appellant along with the articles seized were taken to the Excise Range Office and Ext.P4 crime and occurrence report was registered. Under Ext.P8 forwarding note the sample taken from one of the barrels was sent for chemical analysis. Ext.P9 chemical analysis report was obtained. After completing the investigation a final report was laid before the Court of Judicial First Class Magistrate, Adimali. The learned Magistrate committed the case to the Court of Session, Thodupuzha and from there it was made over to the Court of II Additional Sessions Judge, Thodupuzha for trial and disposal. The appellant/accused appeared before the court and after complying with the mandatory procedures charge under Section 55(g) of the Abkari Act (for short `the Act') was framed and it was read over and explained to him. The appellant/accused pleaded not guilty and claimed to be tried. To prove the charge against the appellant/accused prosecution has examined PWs 1 to 4 and got marked Exts.P1 to P10 besides identifying MOs 1 to 5. After the closure of the evidence of the prosecution the appellant/accused was questioned under Section 313, Cr.P.C. and he denied all the incriminating circumstances put to him. Finding that the appellant/accused was not entitled to get an acquittal

under Section 232 Cr.P.C. he was called upon to enter on his defence. However, he had not adduced any evidence in defence. After appreciating the evidence on record and hearing the arguments on both sides the trial court found that prosecution has succeeded in establishing the guilt of the accused under Section 55(g) of the Act and consequently found him guilty thereunder. It was in the said circumstances that he was convicted and sentenced as aforesaid. Hence, this appeal.

2. I have heard Advocate Vipin Narayan appearing for the appellant on State Brief and also the learned Public Prosecutor.

3. The learned counsel for the appellant contended that the mandatory statutory provisions were not at all complied with in this case. It is submitted that the evidence on record would reveal that the articles allegedly seized from the spot were not at all sealed and labelled. It is also contended that though PW3 deposed that the sample taken was sealed and labelled he had not adduced any evidence in respect of the same. That apart, it is contended that the evidence on record would reveal that the entire residue of wash in the barrels was destroyed without complying with the statutory mandatory provisions under Section 53(A) of the Act. It is further submitted that no inventory was prepared, photographs were not taken and no certificate as contemplated under

the provisions were obtained from the learned Magistrate and it was without following such mandatory procedures that the entire residue was destroyed. In short, according to the learned counsel for the appellant, there was absolute absence of any evidence to arrive at the guilt of the appellant. It is further contended that the trial court without considering those crucial aspects, relying on the evidence of PW3 and also Ext.P9 chemical examination report, arrived at the finding that the prosecution has succeeded in establishing the guilt of the accused and consequently convicted him and sentenced as aforesaid. In such circumstances, it is contended that the judgment of conviction is liable to be interfered with. Per contra, the learned Public Prosecutor contended that the trial court has rightly relied on Ext.P9 chemical examination report and the evidence of PW3. It is further contended that no legal infirmity could be attributed in the matter of seizure of MOs 1 to 5. The evidence of PW3 would reveal that MOs 1 to 5 were seized from the spot inside the forest area and merely because the entire residue of wash, after taking the sample, was destroyed that by itself is no reason for the appellant to claim for an acquittal. In short, it is contended that the conviction was entered against the appellant based on the evidence on record and no ground whatsoever was made out by the appellant for interfering with the judgment of conviction.

4. As noticed hereinbefore, to bring home the charge against the appellant herein prosecution had examined PWs 1 to 4. PWs 1 and 2 were the independent witnesses and in fact, they were the attesting witnesses to Ext.P1 mahazar. Evidently, PWs 1 and 2 turned hostile to the prosecution and they had deposed before the court that they had seen the accused in the jeep but, they had not seen the seizure of the articles mentioned in Ext.P1 mahazar. PW3 was the detecting officer as also the investigating officer. He was the then Excise Inspector attached to Excise Range Office, Adimali. He deposed that on 18.10.2012 he was conducting patrol duty and on obtaining a reliable secret information regarding the illegal possession and keeping of implements for manufacturing liquor in the forest area near to Kattamudi Tribal Settlement Colony in Mannamkandam Village he went there along with the Excise party. About 750 metres away from the Cardamon estate of Ramankani in Kattamudi forest area they found a temporary shed made of plastic sheet and when they reached there they found the appellant inside the shed handling wash. He was seen pouring wash from a barrel to an Aluminium pot. On inspection it was found that one of the barrels contained 80 litres of wash and inside the Aluminium pot also 5 litres of wash was found. He would also depose that another Aluminium pot having a capacity of 20 litres and illichatty were also found inside the shed. As the appellant was keeping the wash and implements for

distillation of arrack he was arrested under Ext.P5 arrest memo and the articles (MOs 1 to 5) were seized under Ext.P1 mahazar. From one of the barrels sample of wash was taken and after sealing and labelling the same it was sent for chemical analysis under Ext.P8 forwarding note. He would also depose that Ext.P9 is the chemical examination report obtained on analysis and it would reveal the presence of 4.07% by volume of ethyl alcohol in the sample. He deposed in chief that in such circumstances the investigation was completed and he laid the final report. From the evidence of PW3 it is clear that it was he who detected the offence and thereafter he himself conducted the investigation and laid the final report. Normally, a detecting officer is not supposed to conduct the investigation. In a case where the detection as also the investigation were conducted by one and the same officer it would be a case where the complainant and the investigating officer would be the same person and in such circumstances, the investigation conducted could not be said to be fair and proper in terms of the decision of a learned Single Judge of this Court in **Noushad v. State of Kerala (2000 (1) KLT 785)**. Subsequently, a Division Bench of this Court in **Kader v. State of Kerala (2001 (2) KLT 407)** overruled the decision in **Noushad's** case (supra). It is to be noted that the said decisions were rendered in a case under the NDPS Act. The reason for interfering with the decision in **Noushad's** case (supra) by the Division Bench is

that investigation by the complainant police officer in a case under the NDPS Act could not be held as improper or illegal for the simple reason that the main part of the investigation would be over at the time when the offence was detected and in such a case what would remain is only sending of sample for chemical analysis and lodging of a final report on receipt of the report of chemical analysis. In the said circumstances, the Division Bench held that unless the accused establishes a prejudice caused to him by virtue of the same person acting as the detecting officer and investigating officer on that ground a conviction could not be interfered with. Though this is a case under the Abkari Act in this case also main part of the investigation was over at the time when the offence was detected and thereafter what remains was only sending of sample for chemical analysis and filing the final report on receipt of the analysis report and therefore, the decision in **Kader's** case (supra) would apply in this case, as well. I am fortified in my view by a decision of this Court in **Biju v. State of Kerala** reported in **(2011 (4) KLT SN 41 (Case No.41)**. True that, in this case, all such activities were done by PW3. In other words, he himself acted as the detecting officer as also investigating officer. Evidently, in this case, the appellant had not established any prejudice owing to the said procedure adopted by PW3. In such circumstances, in the light of the decision by the Division Bench in **Kader's** case (supra) and Biju's case (supra) the aforesaid reason by

itself is no ground for interfering with the judgment of conviction passed by the trial court.

5. At the same time, the evidence of PW3 has to be carefully scrutinised in the light of the specific contentions raised by the appellant. As noticed hereinbefore, the learned counsel for the appellant contended that the evidence on record would reveal that MOs 1 to 5 were not sealed and no inventory was prepared. It is also contended that the samples allegedly collected from one of the barrels on 18.10.2012 was seen produced before the court only on 20.10.2012. No explanation whatsoever was offered for the said delay, though it is only one day. Apart from deposing that the same and MOs 1 to 5 were under his custody PW3 did not assigned any reason for the delay. In the light of such contention the oral testimony of PW3 has to be analysed. A scanning of the same would reveal that though he had deposed to the effect that on reaching the spot in question he found the appellant handling the wash and also that he found a barrel containing 80 litres of wash, an Aluminium pot having a capacity of 20 litres and 5 litres of wash in another Aluminium pot he deposed only that he had collected sample of wash. It is pertinent to note that PW3 did not depose as to whether it is from the barrel or from the Aluminium pot that the sample of wash was collected. That apart, though he had stated that he had

sealed and labelled the sample a perusal of the evidence of PW3 would reveal that he had not deposed as to the nature of the vessel in which the sample was collected. Whether it was clean and what exactly was its capacity were not at all discernible from the oral testimony of PW3. It is also pertinent to note that apart from stating that he had sealed and labelled he did not depose as to what was the seal which had affixed on the vessel containing the sample. In short, there was absolute absence of any evidence in that regard in the evidence of PW3. That apart, while being cross examined PW3 would depose that he had not put any seal on MOs 1 to 5. In the chief examination he had specifically deposed that after taking the sample of wash the rest of the wash were destroyed at the spot itself. He would also depose while being cross examined that it was destroyed without preparing the inventory. PW4 was the Village Officer who prepared the sketch. With the evidence thus adduced by PW3 the question is whether the finding of the trial court that the prosecution has succeeded in proving the guilt of the accused under Section 55(g) of the Act could be sustained ? For considering the aforesaid question in an appropriate manner two decisions of this Court have to be born in mind viz., the decision of a Division Bench of this Court in **Ravi v. State of Kerala (2011 (3) KLT 353)** and a decision of this Court in **Damodaran v. Station House Officer (2008 (1) KLT SN 15 (C.No.18))**. The evidence of PW3 would undoubtedly reveal that

the articles in question were seized under Section 34 of the Act. When that be so, in the light of the decision in **Ravi's** case (supra) a report regarding the factum of seizure of properties should be given to the court forthwith though it is not necessary to produce the articles seized under Section 34 of the Act before the learned Magistrate forthwith either by virtue of Section 102(3), Cr.P.C. or by virtue of any other provision in Abkari Act and the Abkari Manual. In the light of the decision in **Ravi's** case (supra) they should also to be produced before the court without unnecessary delay. Further, the delay, if any, has to be explained satisfactorily. In this case, going by the said decision, it is the bounden duty of the prosecution to prove that the sample taken from the contraband liquor seized from the accused are reached the chemical examiner in a fool proof condition. Going by the decision in **Damodaran's** case (supra) it is mandatory to follow the procedures under Section 53A of the Act. Bearing in mind the said decision the question whether the mandatory procedures followed scrupulously in this case has to be considered. There cannot be any doubt with respect to the position that the articles were seized in this case and the appellant was arrested under Section 34 of the Act. The arrest and seizure were allegedly effected on 18.10.2012 though Ext.P8 forwarding note is dated 19.10.2012. It would reveal that it reached the court only on 20.10.2012. Ext.P7 would reveal that MOs 1 to 5 and the sample of 5 ml

of wash taken in a glass bottle having a capacity of 750 ml. were also sent to the court as per the same and they reached the court only on 20.10.2012. Going by the case of the prosecution the samples and MOs 1 to 5 were seized under Ext.P1 mahazar and PWs 1 and 2 are the attesting witnesses to the same. PW1 had denied his signature in Ext.P1 though PW2 admitted his signature. Evidently, both of them had deposed to the effect that they had not seen the seizure of the articles from the spot. They deposed that they found the appellant in the jeep. PW3 did not depose that PWs 1 and 2, the independent witnesses, were taken to the forest by the patrolling party. In such circumstances, when they had deposed that they had not seen the seizure, there is no reason to disbelieve their version. Add to it, they had specifically stated that they had seen the appellant only in the jeep. Despite such statement, it is evident that they were not specifically cross examined on the said points by the learned Additional Public Prosecutor with the permission of the court. From Exts.P7 and P8 it is evident that though incident allegedly occurred on 18.10.2012 the sample as also MOs 1 to 5 reached the court only on 20.10.2012. It is in this context that the failure on the part of PW3 to adduce evidence regarding the manner in which the sample was sealed and labelled assumes relevance. As noticed hereinbefore, he did not depose before the court as to what kind of seal was affixed on the vessel in which the sample was taken. It is to be

noted that while being examined as PW3 he has also not cared even to give a description of the vessel in which it was taken. In such circumstances, even a delay of one day especially, when it was not explained though required to be explained in view of the decision in **Ravi's** case (supra), turns fatal to the prosecution case. The absence of the manner in which it was sealed after seizure, from the spot and the fact that it was produced before the court after a day and the absence of any explanation, would not ensure that the same was kept intact immediately after the seizure. It is to ascertain whether it was kept intact or not that the detecting officer is supposed to give the details with respect to the manner in which he had put the seal immediately after the seizure. At any rate, in view of the absence of any such evidence from the part of PW3, the delay and failure to adduce evidence regarding the manner in which seal was put the delay in producing the sample allegedly taken on 18.10.2012 would definitely be fatal to the case of the prosecution.

6. Evidently, in this case, a specific contention was taken before the trial court as also before this Court that the articles seized under Section 34 of the Act viz., the residue of wash were destroyed without following the procedures under Section 53A of the Abkari Act. A perusal of the impugned judgment would reveal that the said contention

was considered by the trial court and it was not treated as a serious lapse owing to the fact that the counsel for the accused had failed to establish that it is a mandatory procedure. In such circumstances, the question is whether the procedures prescribed under Section 53A of the Abkari Act are mandatory or directory in nature ? For consideration of the said issue it is appropriate to refer to the said provision and it reads thus:-

**"53A. Disposal of seized liquor, intoxicating drugs or articles.**-(1) Notwithstanding anything contained in this Act, the State Government may having regard to the nature of the liquor, intoxicating drug or article, its vulnerability to theft, substitution, constraints of proper storage space or any other relevant consideration, by notification in the official Gazette, specify such liquor intoxicating drug or article which shall, as soon as may be after its seizure, be disposed of by the authorised officer referred to in section 67B, in such manner as the Government may, from time to time determine after following the procedure hereinafter specified.

(2) Where any such notified liquor, intoxicating drug or article has been seized under this Act, the authorised officer shall prepare an inventory of such liquor, intoxicating drug or article containing such details relating to their description, quality, quantity, mode of packing, marks, numbers of such other identifying particulars of the liquor, intoxicating drug or article or the packing containers in which they are kept, place of origin and other particulars, as the authorised officer may consider relevant to identify the liquor, intoxicating drug or article in any proceedings under this Act and make an application to any Magistrate having jurisdiction over the area where the seized liquor, intoxicating drug or articles are stored for the purpose of-

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of such liquor, intoxicating drug or article and certifying such photographs as true; or

(c) allowing to draw representative samples of such liquor, intoxicating drug or article in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2) the Magistrate shall, as soon as may be, visit the place where such liquor, intoxicating drug or articles are stored and take appropriate steps as specified in clauses (a), (b) and (c) of sub-section (2), and allow the application.

(4) Where any liquor or intoxicating drug or article under this Act has been kept under the custody of any court in connection with any offence committed under this Act, before the commencement of the Abkari (Amendment) Act, 2003 or has been brought before a Magistrate without complying the procedure laid down in sub-section (2), the authorised officer shall obtain prior permission of the Court or Magistrate before initiating proceedings under sub-section (2).

(5) Notwithstanding anything contained in the Indian Evidence Act, 1872 (Central Act 1 of 1872) or the Code of Criminal Procedure, 1973 (Central Act 2 of 1974), any Court trying an offence under this Act, shall treat the inventory, the photographs of liquor, intoxicating drug or article and any list of samples drawn under sub-sections (2) and (4) and certified by the Magistrate, as primary evidence in respect of such offence."

A perusal of Section 53A of the Act would reveal that it prescribes the

manner in which seized liquor, intoxicating drug or article are to be disposed. A careful scanning of the provisions under Section 53A of the Act would reveal that the procedures contemplated under Section 53A(2) of the Act have to be followed before the destruction of the articles invoking the power under Section 53A. Evidently, it is only the authorised officer who is competent to order for the destruction of the seized articles in terms of the provisions under Section 53A going by provisions under Section 67B of the Act. A perusal of sub-section (2) of Section 53-A would reveal that the authorised officer shall have to prepare an inventory of such liquor, intoxicating drug or article containing such details relating to their description, quality, quantity, mode of packing, marks, numbers of such other identifying particulars of the liquor, intoxicating drug or article or the packing containers in which they were kept, place of origin and other particulars, as the authorised officer may consider relevant to identify the liquor, intoxicating drug or article and then make an application to any Magistrate for the purpose of certifying the correctness of the inventory so prepared. Clause (b) of Section 53A(2) provides that in the presence of such Magistrate photographs of such liquor, intoxicating drug or article and certifying such photographs have to be done. Going by clause (c) of Section 53-A (2) in the presence of such Magistrate representative samples of such liquor, intoxicating drug or article could be drawn after certifying

correctness of any list of sample so drawn. Sub-section (5) of Section 53A also assumes relevance. Going by the same, an inventory, the photographs of liquor, intoxicating drug or article or any list of samples drawn in terms of sub-sections (2) and (4) and certified by the Magistrate has to be treated as primary evidence by a court while trying an offence under the Act. The question whether the procedures thus prescribed under Section 53A are mandatory or not was considered by this Court in **Damodaran's** case (supra). This Court held that an excise official or a police officer who detects offences under the provisions of Abkari Act is under the bounden duty to follow these provisions of the Act and that the said procedures prescribed under Section 53-A are mandatory in nature. I may hasten to add that in a case where the procedures which were to be followed in terms of the decision in **Ravi's** case (supra) were scrupulously followed or in other words, the factum regarding the seizure of the article under Section 34 of the Act was reported to the court forthwith and the seized articles were produced before the court without any delay and delay, if any, was explained the failure to follow the procedures under Section 53A would not be fatal to the prosecution case. But, a case where such articles were destroyed even without following the procedures to be followed by virtue of **Ravi's** case (supra) the failure to follow the procedures prescribed under Section 53-A would be fatal to the prosecution. In a case where the

prosecution asserts that seizure was effected from a contraband liquor or a material which was used for preparing illicit liquor in huge quantity and the said huge quantity were destroyed without following the procedures and in the absence of any evidence to show that a sample was taken from the residue which were destroyed, it would amount to deprivation of the statutory safeguard which is embodied in Section 53-A of the Act. Even if the detecting officer or the authorised officer is of the view that the quantity of such liquor were to be destroyed and at the same time, the person who was found in possession of such materials was to be prosecuted, for a successful prosecution the procedures under Section 53-A are to be followed and in such circumstances, in terms of sub-section (5) of Section 53-A despite the destruction of such articles the inventory, the photographs along with the certificate by the Magistrate would act as a primary evidence in respect of such offence. When that be the position, the failure of following the procedures under Section 53A scrupulously would definitely vitiate the very prosecution itself. These crucial aspects were not at all seriously taken note of by the court below. There cannot be any doubt with respect to the fact that when the conclusions were arrived at by a court without seriously taking note of materials which require serious consideration or if irrelevant materials were given due consideration the appreciation would amount to perverseness. In this case, the aforesaid crucial aspects would

undoubtedly reveal that the appreciation of the evidence on record by the court below was utterly perverse. That apart, it is evident that the failure to comply with the procedures referred to hereinbefore in detail virtually vitiated the conviction of the accused. In such circumstances, the conviction entered against the appellant and the consequential sentence imposed on him as per the impugned judgment require appellate interference.

In the result, this appeal is allowed. The judgment of conviction passed by the Court of II Additional Sessions Judge, Thodupuzha in S.C.No.330 of 2013 is set aside. The appellant is set at liberty in case his detention is not warranted in connection with any other case. The bail bond stands cancelled. Before parting with the case I would like to place on record the appreciation for Advocate Vipin Narayan for having conducted the matter with great authenticity.

Sd/-  
C.T.RAVIKUMAR  
Judge

TKS