

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

WEDNESDAY, THE 17TH DAY OF JUNE 2015/27TH JYAISHTA, 1937

CRL.A.No. 2248 of 2005 ()

**AGAINST THE JUDGMENT IN SC 290/2000 OF ADDL. SESSIONS COURT FOR
THE TRIAL OF ABKARI ACT CASES, NEYYATTINKARA**

AGAINST THE JUDGMENT IN CP 139/1999 of J.M.F.C.-III, NEYYATTINKARA

APPELLANT(S)/PETITIONER.:

**CHANDRIKA, D/O. SARADA,
RAJESH BHAVAN, PULIYADICHANVILA,
KAZHIVOO DESOM,
KANJIRAMKULAM VILLAGE,
NEYYATTINKARA TALUK.**

BY ADV. SRI.BLAZE K.JOSE

RESPONDENT(S)/RESPONDENT.:

**THE STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA
REPRESENTING CHARGE SHEET LAID BY THE EXCISE
INSPECTOR, THIRUPURAM EXCISE RANGE.**

BY PUBLIC PROSECUTOR SMT.SEENA RAMAKRISHNAN

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 17-06-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

STK

P.D. RAJAN, J.

Crl. Appeal No.2248 of 2005

Dated this the 17th day of June, 2015

JUDGMENT

This appeal is preferred against the conviction and sentence in S.C.290/2000 of the Additional Sessions Judge (Trial of Abkari Cases) Neyyattinkara for offence under Section 58 of the Abkari Act. She was sentenced to undergo rigorous imprisonment for two years and to pay a fine of rupees one lakh and in default to undergo simple imprisonment for three months.

2. The prosecution allegation was that on 03.09.1997, the Preventive Officer of Neyyattinkara Excise Range Office, who was in additional charge of the Thiruparam Excise Range Office was conducting patrol duty, when they reached in front of the house of one Appukuttan Nadar on the Koonanvila - Oottara public road at Kazhivoor Desom, Kanjiramkulam Village, appellant was found in possession of 5 litres of arrack in a jerry can. PW3 intercepted the appellant and seized the arrack. She was arrested from the place of occurrence and on

reaching at the Excise Office, Thirupuram he registered a crime and after completing the investigation, Excise Inspector laid final report before Judicial First Class Magistrate-III, Neyyattinkara. From there, the case was committed to Sessions Court, Thiruvananthapuram, from there it was made over to the Special Court, Neyyattinkara. The trial court after sifting and weighing the evidence on record convicted the accused under Section 58 of the Abkari Act. Hence this appeal.

3. To substantiate the above allegation, prosecution examined PW1 to PW7 and marked Ext.P.1 to P9. The material objects seized by PW1 were marked as MO1. The incriminating circumstances brought out in evidence were denied by the appellant while questioning her under Section 313 Cr.P.C. She was also heard under Section 232 of Cr.P.C and the trial court called upon her to enter on defence evidence. She examined DW1 as defence witness.

4. The learned counsel appearing for the appellant contended that the detecting officer has no jurisdiction to

enter within the jurisdiction of another Excise Range Office, since he has not produced any documents to show the special authorization. MO1 was seized in another crime of Neyyattinkara Excise Range Office and there was no proper sampling and labelling of the seized article. Without proper authorization, the thondi article seized in the Neyyattinkara Excise Range was produced before court and chemical examination was conducted without proper authorisation obtained from the Judicial First Class Magistrate, Neyyattinkara. When there is no evidence to prove that the seized article was arrack, the conviction against the appellant is not sustainable in law.

5. First I have considered the jurisdictional aspect put forward by the learned counsel appearing for the appellant. The evidence of PW3 shows that on 3.9.97, he was conducting special duty as per the directions of Excise Inspector, Neyyattinkara who is in-charge of Excise Range Office, Thirupuram, while he was proceeding through the place of occurrence, appellant was found standing by the side of the road carrying a jerrycan. Upon

suspicion, he intercepted the appellant, inspected the jerry can and found arrack in it. He arrested the appellant at the place of occurrence and prepared Ext.P1 mahazar. Ext.P2 is the arrest memo in which appellant and PW3 signed in it. The independent witnesses PW1 and PW2 had also signed in Ext.P.1 mahazar, but they did not support the alleged seizure. PW3 admitted that the offence was detected within the jurisdiction of Thirupuram Excise Range Office. Therefore, Ext.P3 crime and occurrence report was registered in the Thirupuram Excise Range Office.

6. PW4, Excise Preventive Officer also supported the story stated by PW3. In order to avoid repetition of the same version stated by PW3, I am not reiterating the oral evidence of PW4, who identified MO1 and Ext.P.1. But he admitted that MO1 was seized in connection with Excise Range Office, Neyyttinkara. This was also supported by PW5, who is the Excise Range Officer, Thirupuram. He categorically admitted that MO1 was prepared and produced before Judicial First Class Magistrate in

connection with the crime and occurrence report 57/1997 in Neyyattinkara, Excise Range Office. If that be the position, there is no thondi article in Excise Crime no.57/1997 of Thirupuram Excise Range Office. Ext.P3 is the occurrence report in connection with Excise Range Office, Thirupuram. The Excise Inspector, Thirupuram forwarded the thondi articles before court and Ext.P4 is the thondy list. Therefore , I conclude that the thondi articles in Excise Crime No.57/1997 of Thirupuram Excise Range Office were not produced before court as rightly suggested by the learned counsel appearing for the appellant.

7. The Public Prosecutor contended that the sample was taken after obtaining proper authorisation from the Judicial First Class Magistrate, Neyyattinkara and the document was not marked in the trial court. Ext.P6 itself is sufficient to prove the delegation of the authorisation as the additional duty conferred upon PW3. The fact that the independent witness did not support the prosecution is not a ground to discard the seizure of MO1 as per Ext.P1

seizure mahazar. There is no reason to interfere in the findings of the court below.

8. In this backdrop, I have considered the oral testimony of PW7, who was the clerk, who took sample from the contraband articles produced before court. PW7 deposed that while he was working as thondi clerk in Judicial First Class Magistrate, Neyyattinkara, he took sample from the thondi article as per the direction of the Judicial First Class Magistrate, Neyyattinkara. In Ext.P9 the endorsement was made by the Magistrate. Ext.P5 is the chemical examination result. There is no doubt with regard to the contents in Ext.P5. But the only question is whether without obtaining proper authorization from the Magistrate, PW7 could take sample and forward it to the chemical examination lab for chemical examination. It is the primary responsibility of the Abkari Officer to take sample after he was taking charge of the seized article pending orders of Magistrate. It is the primary responsibility of the Abkari Officer to produce such seized articles before the concerned Magistrate without

unnecessary delay and take sample and ensure the authenticity and veracity of the seized article as per law. Unless and until such proper verification and certification is not made by the concerned Magistrate, the truthfulness and credibility of the chemical examination result will be doubted if sample is taken by the clerk without any jurisdiction.

9. This court in **Ravi V. State of Kerala 2011(3) KLT 353** held that:

“13. It is difficult for us to believe that PW4 had produced the properties on 25.08.1997 and the Thondy Section Clerk refused to receive the properties on the ground that he was too busy. Even assuming that such a thing happened, we would have expected the prosecution to examine the Thondy Section Clerk to substantiate the above explanation. For reasons best known to the prosecution the thondy Section Clerk was not examined. 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 change of hands in a taper proof condition.(Vide State of Rajasthan v. Daulath Ram (AIR 1980 SC 1314) and Valsala V. State of Kerala (1993 (2) KLT 550 (SC). No conviction can be entered against the accused in a prosecution as the present one unless it is proved that the sample which was analysed in the Chemical Examiner's laboratory was the very same sample drawn from the contraband liquor allegedly found in the possession of the accused (See Sathi V. State of Kerala (2007 (1) KLT SN57)(C.No.82) and Sasidharan V. State of Kerala (2007 (1) KLT 720). There is no satisfactory link evidence to show that it was the same bottles seized from the appellant which eventually found their way into the hands of the Chemical Examiner and that

there was no meddling or tampering with the bottles while they were in the custody of PW4. Hence, the result of Ext.P7 chemical Analysis cannot be applied against the appellant."

10. Therefore, analyzing the evidence in this case, it is found that there was no proper sampling and no credibility in preparing sample by the clerk and forwarding the same to the chemical examiner's lab. Therefore, the appellant is entitled to get the benefit of doubt in such situation. When a doubt is created in the credibility of the prosecution case, the appellant is entitled to get such benefit . Assessing the totality of the case, I am of the view that the concerned delegation of power by the Excise Inspector, PW3 was also not produced. The production of Ext.P6 is not sufficient to believe that he has delegated such power to PW3. MO1 seized in crime 57/1997 is not sufficient to prove that MO1 was seized is in connection with crime No.57/1997 of Thirupuram Excise Range Office and when there is no sample as alleged by the prosecution, the appellant is entitled to get the benefit of

doubt, resultantly, the conviction and sentence passed by the trial court under Section 58 of Abkari Act is to be set aside and appellant is acquitted and set at liberty. If any amount is paid by the appellant, it shall be returned to the appellant forthwith.

This appeal is allowed.

STK

Sd/-
P.D. RAJAN,
JUDGE

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P.A. TO JUDGE