

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

FRIDAY, THE 3RD DAY OF JULY 2015/12TH ASHADHA, 1937

CRL.A.No. 1089 of 2012 ()

AGAINST THE JUDGMENT IN SC 271/2008 of ADDL. SESSIONS JUDGE (ADHOC)-
II, KALPETTA DATED 30-07-2012

APPELLANT(S)/ACCUSED:

SAJI M.C, AGED 37 YEARS
S/O.CHINNAN, MALAYACHAMKOLLY VEEDU
MALAYACHAMKOLLY BHAGAM, NATHAMKUNI POST
THOMAATTUCHAL VILLAGE, S.BATHERY TALUK.

BY ADV. SRI.A.C.DEVY

RESPONDENT(S)/STATE:

STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM, KOCHI-31.

BY PUBLIC PROSECUTOR SMT.MAYA. P.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 03-07-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.T. RAVIKUMAR, J.

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Crl.Appeal No.1089 OF 2012

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Dated this the 3rd day of July, 2015

JUDGMENT

This appeal is directed against the judgment of conviction in S.C.No.271 of 2008 passed by the Court of Additional Sessions Judge (Ad hoc)-II, Kalpetta. The appellant was the sole accused therein. He was tried, convicted and sentenced for the offence under section 8(1) and punishable under section 8(2) of the Abkari Act. For the conviction thereunder he was sentenced to undergo simple imprisonment for one year and to pay a fine of ₹1,00,000/- and in default of payment of fine, he was ordered to undergo simple imprisonment for a further period of one month.

2. The case of the prosecution is as follows:- On 16.11.2007, PW1 along with the excise party consisting of PW2, was conducting

patrol duty in Muranivayal area in Kottappady village at about 5.50 p.m. They found the appellant/accused sitting on the side of a mud road with a jerry can and his demeanour created suspicion in the minds of the officials and they intercepted him and inspected the jerry can and on such inspection by smelling and tasting, colourless liquid in the jerry can was identified as arrack. The jerry can was having a capacity of 5 litres and it contained 2 litres of arrack. Thereupon, under Ext.P1 memo, the appellant was arrested. 200 ml of sample was collected from the arrack contained in the jerry can and the sample bottle and the jerry can with the residue were sealed and labelled. In fact, a label containing the signature of PW1 and independent witnesses and the accused were affixed. Later, the appellant and the materials were produced before PW3 on 17.11.2007 at about 12 noon and thereupon, he registered Ext.P3 crime and occurrence report. Ext.P4 property list and Ext.P5 forwarding note were prepared by PW3. The bottle containing the sample and the jerry can containing the residue were produced before the court on

17.11.2007. The sample was then sent for chemical analysis and upon analysis, Ext.P8 report was obtained. Ext.P8 report dated 7.4.2008 revealed that the sample contained 59.26% by volume of ethyl alcohol. PW5 had earlier prepared Ext.P6 scene mahazar and got prepared Ext.P7 sketch as well. After the investigation and after obtaining Ext.P8 chemical analysis report, he laid the final report before the Chief Judicial Magistrate, Kalpetta and as per proceedings in C.P. 23/2008 it was committed to the Court of Sessions, Kalpetta. It was taken on file as S.C.No.271 of 2008 and made over to the Court of Additional Sessions Judge (Ad hoc)-II, Kalpetta for trial and disposal. On appearance after complying with the procedures, charges were framed and it was read over and explained to the accused/appellant and he denied the same and pleaded not guilty and claimed to be tried. The prosecution has examined PWs 1 to 5 and marked Exts.P1 to P8 besides identifying MO1 to prove the charge against the accused/appellant. On closure of evidence of the prosecution, the accused/appellant was examined under section 313,

Cr.P.C and he denied all the incriminating circumstances put to him. Finding that the accused/appellant was not entitled to get an acquittal under section 232 Cr.P.C, he was called upon to enter on his defence. However, no evidence was adduced by him. After appreciating the evidence on record, the learned Sessions Judge arrived at the conclusion that the prosecution has succeeded in establishing the guilt of the appellant/accused under section 8(1) of the Abkari Act and consequently, convicted him and sentenced under section 8(2), as aforesaid. Hence, this appeal.

3. I have heard the learned counsel for the appellant and also the learned Public Prosecutor. The learned counsel for the appellant contended that the conviction of the appellant was, in fact, nothing but an outcome of utter, perverse appreciation of the evidence on record. It is contended that various crucial aspects were not seriously taken into consideration by the trial court. The place of incident was not properly identified. Exts.P1 to P3 would reveal that the place of

incident lies in Kottappady whereas Ext.P6 scene mahazar would show that it lies in Mooppainad village. The label which was allegedly affixed on MO1 immediately on seizure was not available when MO1 was taken up for identification in court and the said fact was also not seriously taken note of by the trial court. In view of the failure on the part of the prosecution to properly identify the place of occurrence, the evidence of PW4, independent witness to Exts.P1 and P2 mahazars assumes much relevance and importance, it is contended. PW4 turned hostile to the prosecution and he deposed that he had not witnessed the seizure of the contraband liquid from the accused/appellant. Per contra, the learned Public Prosecutor contended that the evidence on record were properly appreciated by the learned Sessions Judge and the evidence of PWs 1 to 3 and 5 were sufficient to establish the guilt of the accused under section 8(1) punishable under section 8(2) of the Abkari Act. It is further contended that though PW4 turned hostile to the prosecution the evidence would reveal that he admitted his signatures in Exts.P1 and

P2. It is further contended that the mere discrepancy in the name of the village could not be held as fatal to the prosecution in view of the evidence of PW5 with Ext.P6 scene mahazar.

4. In view of the rival contentions especially with respect to the place of occurrence I am of the view that it is to be considered first. PW1 is the detecting officer. He was accompanied by PW2. They would depose that they found the accused/appellant while they were conducting patrol duty at Muranivayal area in Kottappady village. A scanning of the evidence of PW5 the investigating officer who laid the final report would reveal that he prepared Ext.P6 scene mahazar and going by his version and Ext.P6 scene mahazar, the place of occurrence lies in Mooppainand village. In Ext.P2 mahazar which was prepared by PW1, the place of occurrence has been described as an area 5 metres towards north from Nathamkuni-Malayachamkolli road, Nathamkuni in Kottappady village. In Ext.P6, the place of occurrence has been described as the place that lies 5 metres towards

north in Natthamkuni-Malayachamkolli road, Nathamkuni in Mooppainad village. A perusal of Exts.P2 and P6 would reveal that the name of the village is different. However, a scanning of Exts.P2 and P6 would reveal that the place of occurrence was correctly described as a spot 5 metres towards north in Nathamkuni-Malayachamkolli road in Nathamkuni. In such circumstances, though there is difference in the name of the village, as held by the learned Sessions judge, it becomes inconsequential as going by Exts.P2 and P6, the place of occurrence remains one and the same.

5. The learned Sessions Judge found that the evidence of PWs 1 and 2 with Ext.P3 report was sufficient to arrive at the guilt of the accused/appellant. As noticed hereinbefore, it was PW1 who detected the offence. PWs 1 and 2 have deposed to the effect that they found the appellant/accused sitting on the mud road in the aforesaid place carrying a jerry can. They also deposed to the effect that the demeanour on the part of the appellant created suspicion in their

minds and thereupon, he was intercepted and the jerry can was inspected. True that they also deposed that the jerry can having a size of 5 litres on inspection found to have contained 2 litres colourless liquid which on tasting and smelling was identified by them as arrack. It is their case that immediately thereafter 200 ml of sample was taken from the jerry can in a bottle having a capacity of 375 ml and thereafter the bottle containing the sample and the jerry can with the residue were sealed and labelled. A perusal of the evidence of PWs 1 and 2 would reveal that they deposed that the label containing the signatures of PW1 and appellant/accused and the independent witnesses were affixed on them from the place of occurrence. Their evidence would further show that they deposed before the court that while MO1 was put for identification the label was not seen on MO1. It is not their case that the label was seen torn or marking on the label was disfigured whereas they categorically deposed that the label was not seen on MO1. It is pertinent to note that both of them would not depose whether the seal was found, in tact, at that point of time. In

this context it is also relevant to note that both PW1 and PW2 did not depose as to in what manner the bottle containing the sample and the jerry can containing the residue were sealed. PW1 did not depose as to whether it was the official seal or the personal seal that was affixed on them. The said aspect be lightly taken by the learned Sessions Judge. In the light of the decision in **Ravi v. State of Kerala [2011 (3) KLT 353]** it was incumbent on the part of the prosecution to prove that the sample that was seized from the possession of the accused and from the place of occurrence reached the analyst for chemical analysis in tamper proof condition. Merely because of the fact that in the chemical analysis report, it is stated that the seal was found in tact that by itself would not ensure that the sample which was taken from the spot reached the analyst in a tamper proof condition. In this case it is to be noted that the incident occurred on 16.11.2007 at about 5.50 p.m. PW1 deposed that he has affixed the seal on the bottle containing the sample as also the jerry can containing the residue. It

was incumbent on the part of the detecting officer viz., PW1 to depose as to what was the seal affixed on the bottle containing the sample as also the jerry can containing the residue. There cannot be any doubt with respect to the position that upon such detecting of contraband liquid and taking of the sample it is open to the detecting officer to affix either his official seal or his personal seal. When that be so, the detecting officer is bound to give evidence as to what seal was affixed on the bottle containing the sample and the bottle containing the residue. The bottle containing the residue alone would be available at the time of trial. Going by the decision in **Ravi's** case (supra), it is also incumbent to report the factum of seizure of the contraband liquid forthwith to the court and to produce the sample and the residue without unnecessary delay. Going by the said decision the delay, if any, was to be explained sufficiently. Going by the evidence of PW1 the Circle Inspector's office was near to the range office and it would take hardly 5 minutes to reach there. He would also depose that after

arresting the appellant/accused along with the contraband article he was taken to his office by 8 p.m. But, at the same time, the evidence of PW1 and PW3 would reveal that the appellant/accused and the contraband articles were produced before the range office only on the next day at 12 noon. PW1 as also PW5 deposed that till such time the contraband liquid and the materials were in custody of PW1. In the absence of any specific evidence with respect to the manner in which the seal was put and also the nature of the seal which was affixed on the bottle carrying the sample and the jerry can carrying the residue it can only be said that no evidence was let in by the prosecution which would reveal that the sample collected from the place of occurrence was properly sealed and it reached the court in tact and from there, to the chemical analyst for chemical examination in tamper proof condition. In such circumstances, it cannot be said that the sample which was collected from Muranivayal from the accused/appellant reached the analyst in a tamper proof condition. The failure on the part of PW1 to give evidence as to the manner in which the seal was

affixed immediately on the seizure is fatal to the prosecution as that alone is a matter which would indicate whether the sample was in safe custody or not. PWs 3 and 5 also did not depose with respect to the nature of the seal which was found on MO1. In such circumstances, the failure on the part of PWs 1 to 3 and 5 to depose whether seal was found in tact when MO1 was put for identification also assumes relevance. The total absence of label was bound to be explained by the prosecution. The official witnesses did not depose as to whether MO1 contained any sign of affixture of label on it. A careful scanning of the evidence of PWs 1 to 3 and 5 would reveal that they did not depose anything with respect to the said aspect. With respect to the seizure of the contraband article from the accused/appellant and the consequential preparation of Ext.P2 mahazar, PW4 was examined as the independent witness. True that he had deposed that he put signature in Exts.P1 and P2 and he categorically deposed that he put the signatures from Angadikavala. He had categorically deposed that he had not seen the seizure of the contraband liquid from the

accused/appellant. As long as the burden to establish that the sample which was collected from the spot ultimately reached the analyst for chemical analysis in a tamper proof condition was with the prosecution, the prosecution cannot be said to be discharged the said burden simply by relying on the statement in the analysis report that seal was in tact when the sample was taken up for analysis. It would only ensure that from the court it reached the analyst in a tamper proof condition. However in this case, as noticed hereinbefore, the sample was allegedly collected on 16.11.2007 at about 5.50 p.m and going by the evidence of PWs 1 to 3 and 5, it reached the range office on 17.11.2007 at 12 noon. Evidently, it reached the court only thereafter on the same day. The circumstances noted as aforesaid is certainly capable of giving the benefit of doubt in favour of the appellant/accused and in fact, mandates for granting the benefit of doubt. This crucial aspect was not seriously considered and appreciated by the trial court. In the said circumstances, I am of the view that the evidence in this case was not appropriately appreciated

by the trial court. An appreciation of evidence by the trial court could be described as perverse if the material aspect was not properly considered or an irrelevant or inadmissible matter was taken into consideration. In this case, as noticed hereinbefore, the aforesaid crucial aspect was not considered in the manner it was to be considered in view of the position of law. In such circumstances, the judgment of the learned Sessions Judge convicting the accused and consequently sentencing him as aforesaid is liable to be interfered with. Hence, this appeal is allowed. The judgment of the Court Additional Sessions Judge (ad hoc)-II, Kalpetta in S.C. No.271 of 2008 is set aside. The bail bond of the appellant stands cancelled and he is set at liberty.

**Sd/-
C.T. RAVIKUMAR
(JUDGE)**

spc/

C.T. RAVIKUMAR, J.

JUDGMENT

September, 2010