

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

TUESDAY, THE 29TH DAY OF SEPTEMBER 2015/7TH ASWINA, 1937

CRL.A.No. 1639 of 2011 (D)

AGAINST THE JUDGMENT IN SC 122/2008 of SPL. COURT (NDPS ACT CASES),
THODUPUZHA DATED 11-08-2011

APPELLANT/ACCUSED:

DENNIS S/o.VELAMKANNY
HOUSE NO.402, SANTHANPARA PANCHAYATH, POOPARA VILLAGE
UDUMBANCHOLA TALUK.

BY ADVS.SRI.MATHEW JOHN (K)
SRI.DOMSON J.VATTAKUZH

RESPONDENT/COMPLAINANT:

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

BY ADV. PUBLIC PROSECUTOR: SRI ABHIJITH LESLIE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 29-09-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SUNIL THOMAS, J.

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Crl.Appeal.No.1639 of 2011
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Dated this the 29th day of September, 2015

JUDGMENT

The sole accused who stands convicted for offence punishable under Section 8(1)(2) of the Abkari Act is the appellant herein.

2. The allegation of the prosecution is that on 05.07.2007, while the Excise Inspector, Udumpanchola was on patrol duty, they came across the accused carrying a 5 litre can. He was intercepted and inspection revealed that the can contained illicit arrack. After drawing samples, the process of labelling and sealing were done. Thereafter, the accused was produced before the magistrate and investigation followed. At the end of investigation, final report was laid. The accused faced trial before the learned Sessions Judge. On the side of the prosecution, PWs.1 to 4 were examined and Exts.P1 to P9 were marked. MO1 was identified. The court below on an evaluation of the available inputs found the accused guilty, convicted and sentenced him to undergo rigorous imprisonment for one year and to pay a fine of Rs.1,00,000/- and in default, to undergo rigorous imprisonment for three months. This is challenged by the accused in this appeal.

3. Heard both sides and examined the records.

4. The prosecution is essentially relying on the oral testimony of PW1, the Detecting Officer, supported by the contemporaneous documents which are Ext.P1, P2 and P3. PW2 and PW3 were projected as independent witnesses. However, at the time of trial, they turned hostile and did not support the prosecution case. In fact, PW2 denied the signature in Ext.P1 seizure mahazar. Though PW3 admitted his signature, did not support the prosecution case.

5. Ext.P1 contains the essential details of interception, arrest, sampling, sealing and labelling of the contraband and the samples. It is stated that the sample which was drawn along with the contraband was produced before the learned magistrate on the next day itself. This is seen endorsed on the property list marked as Ext.P8. By Ext.P9 original of the forwarding note, the sample was forwarded to the chemical analysis lab. Ext.P5 is the chemical analysis report which indicates that the sample was found to contain Ethyl Alcohol. Ext.P4 is the crime and occurrence report registered at the excise office. Available materials indicate that the samples which were allegedly drawn at the spot reached the Court on the next day itself without considerable delay, from where it was forwarded to the chemical analysis lab. The endorsement of the

chemical analysis lab also indicates that it reached without tampering and the seal in tact. There is nothing to show that there was any interpolation in the interregnum. Learned Public Prosecutor relying on the above materials vehemently contended that the prosecution had succeeded in proving that the offence alleged against the accused is proved, though, learned counsel for the accused citing various authorities and alleging infirmities in the evidence adduced, contended that the accused is entitled for the benefit of doubt.

6. Learned counsel for the accused, relying on the various provisions in Kerala Abkari Shops Disposal Rules, 2002 specifically referring to Rule 8, contended that there was an infraction of the various provisions and the procedures contemplated therein. Learned counsel contended that regarding the process of sampling, the Rules were not complied with. It was further contended that the sampling, labelling and the process of drawing sample were in total violation of Rule 8. Per contra, learned Public Prosecutor contended that the above Rules have no application to the facts of the case since Rules are meant for inspection and search of licensed IMFL and toddy shops. It was contended that it has no application to the facts of the case wherein the search and seizure of an individual was involved.

7. Learned Public Prosecutor was justified in his contention of this aspect. However, learned counsel for the accused contended that in the absence of any specific provision in the Abkari Act, which provides for the procedure to be followed while drawing a sample and governing the process of sealing and labelling, the Rules under Rule 8 of the Kerala Abkari Shops Disposal Rules can be considered as a guiding factor, especially when the process of sampling, labelling and sealing are in dispute. It is true that it may to a limited extent can be considered as a governing procedure for sampling and other contemporaneous processes. However, the entire process cannot be challenged with reference to the infraction of any of the Rules therein since, there is no specific Rule governing the process of sampling, labelling and sealing.

8. Learned counsel vehemently contended that the available material indicated that the allegation of the prosecution that accused was intercepted carrying of contraband item and drawing of samples, the connected processes were conducted at the spot and contemporaneous documents were also prepared therein, is highly unbelievable. It was contended that a perusal of Ext.P1 shows that the Detecting Officer has vaguely referred to the process of drawing sample, sealing and affixture of labels. The meticulous details of such processes are not seen incorporated in Ext.P1.

Learned counsel is justified in so contending since, only a vague reference relating to the entire process is seen in Ext.P1. Apart from that, though the Detecting Officer has mentioned that the sealing was done at the spot, the sample seal is not seen affixed on the mahazar. This assumes significance, since the property list marked as Ext.P8 seen produced in Court on the next day bears the sample seal as well as the imprints of the seal so affixed. There is no explanation as to why, if such imprints are seen on the property list, it was not affixed on Ext.P1. To buttress his argument, learned counsel relied on the decision reported in **Gopalan Vs. State of Kerala (2012 KHC 812)**, wherein this Court had held that in the absence of anything to show the type of seal to be used by the Preventive Officer to seal the sample and the material object, the detection was held to be doubtful. In the above decision, it was held that the prosecution should be rest content without producing relevant documents and not following procedure correctly. The Court concluded that the accused is entitled for the benefit of doubt. This substantiate the contention of the learned counsel that there is a possibility that Ext.P1 was not prepared at the spot. Another fact that was brought out in the course of cross examination was that Ext.P1 bears even the house number of the accused. PW1 did not say that it was as revealed by the accused. Had it been so, it would

have been more believable. On the other hand, PW1 stated that the house number of the accused was verified, while confirming that the house number of his house which was at a nearby place. This casts some doubt on the prosecution case that while preparing Ext.P1 mahazar, which is supposed to be a contemporaneous document, how a counter check of the house number seen in the first sentence of Ext.P1 is possible, by a physical verification.

9. Coupled with the above doubtful circumstances, there is yet another circumstance which casts doubt on the prosecution case. Exts.P1, P6 and P7 are the contemporaneous documents. Ext.P6 is the arrest memo and Ext.P7 is the arrest intimation. Both bears the seal or thumb impression of the accused. It shows that it was prepared at 4.30p.m. Evidently, intimation was given at 4.30 p.m. itself. Correspondingly, arrest notice was also served. Ext.P1 seizure mahazar indicates that it was prepared at 4.30 p.m. Evidently, the arrest and the commencement of the process of preparation of Ext.P1 was simultaneous, at 4.30 p.m. PW1 in his evidence confirmed that before sampling, accused was arrested. That means, even before the process of sampling followed by the labelling and sealing and preparation of the contemporaneous documents, the accused was arrested. It was contended that in such circumstances, entire process of sampling is likely to be

vitiated because of the fact that it was done while the accused was in custody. It was further contended by the learned counsel for the accused that he was not a free man while the process of sampling, sealing and labelling were being conducted, which highly prejudiced him, since he could not freely and effectively participate in the above process and thereby, the entire process of sampling may become an empty formality.

10. Though I am not inclined to accept that the search is vitiated for that reason alone, the above contention has to be appreciated along with the fact that the detection and the process of sampling etc, as mentioned above are not completely free from doubt. Since these facts looms large on the face of the available materials, I feel that it may not be completely safe to rely on the evidence of PW1 alone to arrive at a conclusion regarding the guilt of the accused. Hence, I feel that the benefit of doubt should be extended to the accused.

In the result, the finding arrived at by the court below is liable to be interfered with and is liable to be set aside. The appeal is allowed, conviction is set aside and the accused is acquitted. The bail bond executed by the accused shall stand discharged.

Sd/-
SUNIL THOMAS
Judge

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P.A to Judge