

HIGH COURT OF KERALA**Bench : THE HONOURABLE MR. JUSTICE JOHNSON JOHN****Date of Decision: 4th April 2024****Criminal Appeal No. 1496 of 2009****THANKAPPAN, S/O. ADICHAN, ...APPELLANT****VERSUS****STATE OF KERALA, REPRESENTED BY SUB INSPECTOR,
PATHANAPURAM POLICE STATION ...RESPONDENT****Legislation:**

Section 8(1) and (2) of the Kerala Abkari Act

Subject:

Appeal against conviction and sentence for possession of arrack, challenging the procedural integrity of evidence collection and handling.

Headnotes:

Conviction and Sentence Challenge – Appellant Thankappan convicted under Section 8(1) and (2) of Kerala Abkari Act for possessing 750 ml arrack – Sentenced to 6 months imprisonment and fine of Rs.1,00,000, with additional 3 months imprisonment in default of fine payment – [Para 2]

Evidence and Witness Testimonies – Trial court examined PWs 1 to 3 and marked Exhibits P1 to P7, Mos 1 and 2 – PWs 1 and 2 turned hostile, not corroborating prosecution's version – Key evidence from PW3, the Sub Inspector, lacked details on seal's nature used on contraband and sample bottles [Paras 3-4, 7-8]

Procedural Lapses in Evidence Handling – Critique on absence of seal impression in seizure mahazar (Exhibit P1), property list (Exhibit P5), and forwarding note (Exhibit P6) – Delay in property and sample submission to court, raising concerns about sample integrity and chain of custody [Paras 6, 9-11]

Precedent Reference – Citation of Sasidharan v. State of Kerala [2007(1) KLT 720] highlighting the necessity for tamper-proof dispatch and sample integrity for prosecution – Link evidence requirement to prove offence unmet by prosecution [Para 10]

Acquittal and Release – Due to failure in establishing tamper-proof collection and dispatch of sample, appellant/accused granted benefit of doubt – Conviction and sentence by trial court set aside – Appellant acquitted and released, bail bond cancelled [Para 12]

Decision: Appeal allowed; appellant acquitted and released; conviction and sentence set aside.

Referred Cases:

- Sasidharan v. State of Kerala [2007(1) KLT 720]

Representing Advocates:

Sri. C. Rajendran and Sri. B. Chandra Lal for the appellant

Sri. Sanal P. Raj, Public Prosecutor for the respondent

JUDGMENT

The accused in S.C. No. 848 of 2006 on the file of the Additional Sessions Judge, Kottarakkara filed this appeal challenging the conviction and sentence imposed on him for the offence punishable under Section 8(1) and (2) of the Kerala Abkari Act as per the impugned judgment dated 29.06.2009.

2. The appellant, who is the original second accused, was tried along with the first accused by clubbing S.C. Nos. 785 of 2007 and 848 of 2006 and as per the impugned common judgment, the appellant/2nd accused is sentenced to undergo simple imprisonment for 6 months and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to undergo simple imprisonment for 3 months for the offence under Section 8(1) and (2) of the Kerala Abkari Act.

3. The prosecution case is that on 19.01.2004, at 5.25 p.m., the accused was found in possession of 750 ml. of arrack in a bottle of 1 ½ litre capacity and a glass at Karimpaloor by the Sub Inspector of Pathanapuram Police Station and party and thereby, committed the offence as aforesaid.

4. The trial court, after framing charge, examined PWs 1 to 3 and marked Exhibits P1 to P7 and Mos 1 and 2 from the side of the prosecution. From the side of the defence, DW1 was examined. After trial and hearing both sides, the trial court found the accused guilty of the offence punishable

under Section 8(1) r/w 8(2) of the Kerala Abkari Act and imposed the sentence as aforesaid.

5. Heard Sri. C. Rajendran, the learned counsel for the appellant, and Sri. Sanal P. Raj, the learned Public Prosecutor.

6. The learned counsel for the appellant argued that the Sub Inspector of Police, who detected the case and conducted the investigation, has not given evidence as to the nature of the seal affixed on the contraband articles alleged to be recovered and the sample bottles and in Exhibit P1 mahazar also, the specimen impression of the seal used is not affixed and further, there is also nothing in the mahazar regarding the nature of the seal used. The learned counsel for the appellant also pointed out that a perusal of Exhibit P5, property list, would show that the properties reached the court only on 20.02.2004 and that the specimen impression of the seal used is also not affixed in Exhibit P5 property list or in Exhibit P6, copy of the forwarding note prepared by the Sub Inspector who detected the case.

7. PWs 1 and 2, the independent witnesses examined by the prosecution, turned hostile to the prosecution and deposed that they have not witnessed the occurrence .

8. A perusal of the evidence of PW3, the Sub Inspector who detected the offence and conducted the investigation, shows that even though he deposed regarding the occurrence in tune with the prosecution case, his deposition does not contain the relevant aspects regarding the nature of the seal used when he had drawn sample from the contraband seized. In Exhibit P5 property list also, the specimen impression of the seal is not affixed.

9. The Detecting Officer, who had drawn the sample, had to give evidence as to the nature of the seal affixed on the bottle containing the sample, and the specimen impression of the seal used is also required to be

affixed in the seizure mahazar and the property list so as to enable proper comparison to ensure tamper free collection and production of sample before the court and the Chemical Examiner's Laboratory. As noticed earlier, the specimen impression of the seal used is also not seen affixed in the copy of the forwarding note marked as Exhibit P6.

10. In ***Sasidharan v. State of Kerala*** [2007(1) KLT 720], this Court has held that the prosecution has a duty to prove that it was the sample taken from the contraband liquor seized from the accused which had reached the hands of the Chemical Examiner in a fool proof condition, unless the link evidence of actual sampling and sending the same in a sealed packet to the Chemical Examiner with a specimen seal sent separately for tamper proof despatch, the prosecution cannot be held to have brought home the offence against the appellant.

11. The absence of impression of specimen seal in the mahazar, property list and forwarding note and the delay in producing the properties and sample before the court are circumstances to doubt the identity of the sample drawn and the sample sent for chemical analysis. As per Exhibit P1 mahazar, the offence was detected and the sample was drawn on 19.01.2004. But, a perusal of Exhibit P5 property list would show that the properties reached the court only on 20.02.2004. It cannot be disputed that the prosecution is duty bound to prove that there was tamper proof despatch of the sample to show that the sample taken from the contraband articles seized from the accused was the sample which reached the hands of the Chemical Examiner. Since the prosecution failed to prove the same, it cannot be held that the link evidence was established.

12. Therefore, on a careful re-appreciation of the evidence available, I find that the prosecution has failed to comply the mandates necessary to ensure tamper proof collection and despatch of sample and in

that circumstance, it is found that the appellant/accused is entitled for the benefit of reasonable doubt and therefore, the conviction and sentence imposed by the trial court against the appellant/accused is liable to be set aside.

In the result, the appeal is allowed and the conviction and sentence imposed by the trial court against the appellant/accused is set aside and he is acquitted of the offence punishable under Section 8(1) r/w Section 8(2) of the Kerala Abkari Act. The bail bond executed by the appellant/accused shall stand cancelled and he is set at liberty forthwith.

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