

**Achuthan Vs. The State of Kerala, represented by Excise Inspector Through The Public Prosecutor**

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**SooperKanoon Citation :** [sooperkanoon.com/1181438](http://sooperkanoon.com/1181438)

**Court :** Kerala

**Decided On :** Jan-27-2016

**Judge :** K. Ramakrishnan

**Appeal No. :** CRL. A. No. 1996 of 2004

**Appellant :** Achuthan

**Respondent :** The State of Kerala, represented by Excise Inspector Through The Public Prosecutor

**Judgement :**

1. Accused in S.C.No.94/2002 on the file of the Additional Sessions Court (Fast Track-I), Manjeri, is the appellant herein. The appellant was charge-sheeted by the Excise Inspector, Kalikavu Excise Range in Crime No.11/1997 of the Kalikavu police station under Section 55 (a) and (i) of the Abkari Act.

2. The case of the prosecution in nut shell was that, on 19.06.1997 at about 06.00 p.m., the accused was found to be in possession of 1.750 liters of Indian Made Foreign Liquor in his house with No.III/583 of Pandikkad and he was keeping the same for the purpose of sale and he was engaged in sale of the same in violation of the provisions of Abkari Act, thereby he had committed the offences punishable under Section 55(a) and (i) of the Kerala Abkari Act.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court-I, Perinthalmanna, and the case was taken on file as C.P.No.1/2002. Thereafter it was committed to the Sessions court, Manjeri by the learned magistrate under Section 209 of the Code of Criminal Procedure (hereinafter called 'the Code'). After committal, the case was taken on file as S.C.No.94/2002 on the file of the Sessions Court, Manjeri and it was originally made over to the Additional Sessions Court (Adhoc-I), Manjeri, for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under Section 55(a) and (i) of the Abkari Act was framed and the same was read over and explained to him and he pleaded not guilty. In order to prove the case of the prosecution, PWs 1 to 6 were examined and Exts.P1 to P8 and MOs 1 to 4 were marked on their side. After closure of the prosecution evidence, the accused was questioned under Section 313 of the Code of Criminal Procedure and he denied all the incriminating circumstances brought against him in the prosecution evidence and he had further stated that, he had not committed any offence and he has been falsely implicated in the case at the instigation of the nearby toddy shop owner, as he had conducted agitation against running of such shop in that area. Since the evidence in this case did not warrant the acquittal under Section 232 of the Code, the accused was called upon to enter on his defence. But no oral evidence was adduced on his side, but Ext.D1 was marked on his side. After considering the evidence on record, the court below found the appellant guilty under Section 55(a) and (i) of the Abkari Act and convicted him thereunder and sentenced him to undergo rigorous imprisonment for three years and also to pay a fine of Rs.1,00,000/-, in default to undergo simple imprisonment for six months. No separate sentence was awarded for the offence under Section 55(a) and 55(i) of Abkari Act. Set off was allowed for the period of detention already undergone by him under Section 428 of the Code of Criminal Procedure in this case. Aggrieved by the same, the present appeal has been preferred by the appellant/ accused before the court below.

5. Heard Smt.Smitha Babu, counsel representing Sri.Babu S.Nair, counsel appearing for the appellant and Smt.Seena Ramakrishnan, learned Public Prosecutor appearing for the State.

6. The counsel for the appellant submitted that, though it was a house search, no search memo was sent to court and no reason has been recorded for his satisfaction regarding the commission of the offence and no reason was stated as to why search warrant could not be obtained before conducting the search. Further the search was conducted in violation of Section 31 and 36 of the Abkari Act and as such it is vitiated. Further there is no evidence to show that the accused was engaged in sale of the article. The persons alleged to have been present at that place was not even questioned or cited as witnesses to prove the alleged sale. Further merely because some amount was found in the pocket of the accused, it cannot be said that it was the sale proceeds obtained by sale of the article. She had also argued that, there was no specimen seal impression provided and there was no seal affixed on the other bottle and no signature of the witnesses obtained on the label. So it cannot be said that the same articles have reached the court so as to come to the conclusion that the chemical analysis report relates to the representative sample said to have been taken from the article.

7. Further no sample was taken from the other bottles so as to come to the conclusion that all the bottles contained Indian Made Foreign Liquor. Further the liquor said to have been found in the glass was not taken into custody so as to prove that what was poured into the glass was Indian Made Foreign Liquor. So under the circumstances, according to the learned counsel, the prosecution has failed to prove the case beyond reasonable doubt. The learned counsel relied on the decision reported in *Suraj v. Excise Inspector* [2001 (1) KLT 169 (SC)] and *Prabhakaran v. Excise Inspector* (2002 (1) KLT 896), and *Ulrichweitz v. State of Kerala* (2012 KHC 108) and *Mohammed Abdul Mallik and Others v. State of Assam* (2014 KHC 3961) in support of their case.

8. On the other hand, learned Public Prosecutor submitted that merely because the search memo was not sent alone is not sufficient to disbelieve the case of the prosecution. It is only an irregularity and that will not vitiate the finding and court can rely on the material for convicting the accused. There is no delay in producing the article and as such there is no possibility for tampering. So according to the learned Public Prosecutor, the court below was perfectly justified in convicting the appellant for the offence alleged. He had also relied on the

decision reported in *Dominic V. State of Kerala* (1989 (1) KLT 601) and *Madhavan v. Excise Inspector* (2000 (1) KLT 311) in support of his case.

9. The case of the prosecution as emerged from the prosecution witnesses was that, on 19.06.1997 at about 6.00 p.m, while PW1, the preventive officer attached to the Kalikavu Excise Range was doing patrol duty along with PW2 and others, and when they reached Eriyattu junction, he got reliable information that one Achuthan was conducting unauthorized sale of Indian Made Foreign Liquor from his house. On satisfaction of the information, he along with PWs 3 and 4 and the party went to the house and found two persons sitting in a cot placed in the varantha of the house facing each other with glasses in front of them and one person pouring some liquid into those glasses from a bottle in his hand. Immediately they went there and caught hold of the bottle and examined the contents of the bottle and satisfied that it was Indian Made Foreign Liquor and it was having a capacity of 375 ml., containing a label super jack fine brandy having 160 ml. in it. Thereafter he examined the contents of the glass and satisfied that it was Indian Made Foreign Liquor. When he questioned the person who was pouring the liquor, he disclosed his name as Achuthan, who is the accused in this case. When he asked the other two persons, they told that they came there for taking liquor. Thereafter he conducted search of the house in the presence of PWs 3 and 4 and found four bottles of Indian Made Foreign Liquor of 375 ml., each with brand name Mc. Dowell brandy (two bottles), Honey Bee brandy (one bottle), Mens club fine whiskey and also found an empty bottle with label, Coleman xxx rum and one measuring glass in a cardboard, which is identified as MO 1 series, and MO3. He had sealed the bottle from which the liquor was poured and labeled the same and since other bottles were already sealed having the sticker of Kerala State Beverages Corporation, he did not seal the same separately. When he conducted body search of the accused, he found six ten rupee notes (Mo(iv) series) in his shirt pocket and he had seized the same and he had prepared Ext.P3 search list in the presence of witnesses and seized these article as per Ext.P1 seizure mahazar. He arrested the accused as per Ext.P2 arrest memo and he came to excise office and entrusted the accused and the articles and the documents prepared to PW6 the Excise Inspector of that Excise Range. On the basis of those materials, PW6 registered Ext.P6 crime and occurrence report as

C.R. No.11/97 of Kalikavu Excise Range under Section 55(a) and (i) of the Abkari Act. He produced the accused before court along with remand report. He prepared Ext.P7 property list and sent the same to court along with the contraband articles seized. He sent Ext.P8 forwarding note with a request to send the sample for analysis and the same was sent from court and Ext.P5 chemical analysis report obtained. The investigation in this case was conducted by PW4, the successor Excise Inspector. He questioned the witnesses and recorded their statements. He collected Ext.P5 chemical analysis report, closed the investigation and submitted final report.

10. PWs 3 and 4 are the independent witness to the search and seizure. Though PW3 had admitted the signature in Ext.P1, he denied having seen the seizure or arrest. He had admitted that he is a neighbor of the accused and he knew the accused and he used to consume alcohol. So it is clear from his evidence that he is trying to help the accused and that was the reason why he is not supporting the case of the prosecution. But he had admitted that he had signed the document from near the house of the accused from the road. So his presence at the place of occurrence is proved by his evidence. PW4 had denied having the seen the seizure or arrest of the accused. He had even denied his signature in the documents. But he had admitted that he knew the accused. So it is clear from this that he is now trying to help the accused and that was the reason why he is not supporting the case of the prosecution.

11. Then the available evidence is that of PWs 1 and 2 to the search and seizure and arrest of the accused. PW1 is detecting officer. He had categorically stated that he was working as preventive officer of that range and on 19.06.1997 at about 6.00 p.m., while he was doing patrol duty along with PW2 and when they reached Eriyattu junction, he got information that the accused was engaged in sale of Indian Made Foreign Liquor from his house, immediately he went to the house and found two persons sitting in the cot placed in the varantha of the house and one person pouring some liquid from a bottle in his hand into the glass in front of them, which were identified as MO2 series. He immediately went there along with the witnesses and caught hold of the bottle, which is having a capacity of 375 ml. containing 160 ml. Indian Made Foreign Liquor, which he satisfied on examination

of the liquid. He had also satisfied that the liquid seen in the bottle and the glasses was Indian Made Foreign Liquor. He conducted search of the house and found 4 bottles of Indian Made Foreign Liquor of different brand of 375 ml. each and an empty foreign liquor bottle kept in a cardboard box along with MO3 measuring vessel. When he conducted body search of the accused he found MO4 series six ten rupee notes in his shirt pocket. When he enquired with the persons found there, they told that they came there for consuming liquor. He arrested him and prepared Ext.P2 arrest memo and Ext.P3 search list and seized the same as per Ext.P1 seizure mahazar, after sealing and labeling the bottle which he obtained from the possession of the accused. The evidence given by PW1 was corroborated by PW2 on these aspects. It is true that no search memo was sent before conducting search. Though PW1 had stated that he had sent the same through one Balan, but that person was not examined and that fact was not mentioned in Ext.P4 mahazar as well.

12. Further in the decision reported in *Dominic v. State of Kerala* (1989(1) KLT 601), this court has held that merely because Section 31 is not complied with in making the search by itself will not make the evidence inadmissible in the evidence. The court can rely on the evidence of official witnesses if it is satisfactory. The same view has been reiterated in the decision reported in *Madhavan v. Excise Inspector* (2000 (1) KLT 311). In that case, it has been held that the infraction of proviso to Section 36 does not vitiate the trial, if materials brought on record justified conviction. The dictum laid down in the decisions reported in *Prabhakaran v. Excise Inspector* (2002 (1) KLT 896) and *Suraj v. Excise Inspector* [2001 (1) KLT 169(SC)], are not applicable to the facts of this case. In those cases, it was only considered what is a scope of Section 31 of Abkari Act and even in *Suraj s case* (supra) it was held that, violation of Section 31 alone is not a ground for quashing the proceedings and evidensary value of such search has to be considered at the time of trial. The same view has been reiterated in the decision reported in *Prabhakaran's case* (supra) as well. So those dictums are not applicable to the facts of this case as such. Similarly, the dictum laid in the decision reported in *Ulrichweitz v. State of Kerala* (2012 KHC 108) and *Mohammed Abdul Mallik and Others v. State of Assam* (2014 KHC 3961) are also not applicable to the facts of this case. In those cases, the evidence of search

witnesses including the detecting officer are not satisfactory, apart from that there was a flagrant violation in conducting the search as well and in such circumstances it has been held in those cases that it is not safe to rely on the evidence of official witnesses alone to convict the accused under the provisions of the Narcotic Drugs and Psychotropic Substances Act.

13. There is no question of any violation of proviso to Section 36 of the Abkari Act as two independent witnesses of that locality were taken by the officer for conducting the search. Further in Ext.P1 the seizure of information was recorded and since he was satisfied with the same, he went to the house of the accused and conducted search. In Section 31, it is not mentioned that a search warrant has to be obtained. Section 30 only says that the magistrate or the Excise Commissioner may issue search warrant. Further Section 36 only says that, the search will have to be conducted as far as possible as provided under the Code of Criminal Procedure, so that it is also only directory not mandatory. So under the circumstances, there is nothing to disbelieve the evidence of PWs 1 and 2 on this aspect and merely because independent witnesses turned hostile is not a ground to disbelieve the case of the prosecution as well.

14. It is true that there are no documents produced to prove that the accused is residing in that house. His house number was mentioned as III/583 in the seizure mahazar and in the search list, the house name was shown as Noonampara. The accused had produced Ext.D1, the election identity card to prove that he is residing in house No.645 with name Noonampara at Pandikkadu. The house where the search was conducted is also situated at Pandikkadu. The house name in the search list was shown as Noonampara, which is the same house mentioned in Ext.D1 identity card as well. So it is clear from this that the accused is residing in the house and the search and seizure was proper.

15. Merely because the search and seizure were found to be proper and legal alone is not sufficient to convict the accused for the offence alleged and it is for the prosecution to further prove that the articles said to have been seized have reached the court in a tamper proof condition and the chemical analysis report relates to the representative sample said to have been taken from the articles said

to have been seized from the possession of the accused.

16. In this case, in Ext.P1, the nature of seal used was not mentioned, though at the time of evidence, PW1 had stated that he had used his personal seal with letters 'PV', which fact was not mentioned in Ext.P1. Further he had also admitted that he had not provided the specimen seal impression to the excise inspector and the specimen seal impression was not made available in the forwarding note as well. Neither PW6 nor PW4 had a case that they have obtained a specimen seal impression of the seal used for sealing the article and it was sent to court for verification by the court. Further in Ext.P8 forwarding note also the specimen seal impression was not provided, in the place provided for that purpose. PW6 also admitted that though it was sent on 26.06.1997, the specimen seal impression was not provided. So merely because the chemical analysis report shows that the seal on the bottle was intact and found tallied with the sample seal provided alone is not sufficient to come to the conclusion that there was no possibility of tampering and the same article has reached the court. The specimen seal impression is provided in the seizure mahazar and also in the forwarding note so as to enable the court to satisfy the genuineness of the article produced. Further there was no seal affixed on the remaining bottles and no label was also affixed. The empty bottle as well as the glass and measuring vessel also did not contain any label, as per the mahazar. So under the circumstances, the possibility of tampering and producing the same before the court on the next day cannot be ruled out as such. So under the circumstances, it cannot be said that prosecution was able to establish beyond reasonable doubt that the articles was produced in the court in the same condition, in which it was seized and the chemical analysis report relates to the representative sample said to have been taken from the contraband article seized, so as to convict the accused for the offence alleged. This was so held in the decision reported in *Krishnan .H v. State* (2015 (1) KHC 822). So these aspects were not considered by the court below, before coming to the conclusion that the accused had committed the above said offence and consequential conviction entered by the court below is not sustainable and the accused is entitled to get acquittal of the charge levelled against him giving him the benefit of doubt. In view of the finding that the accused is entitled to get acquittal, the sentence imposed is also not proper and the same is also set aside.

In the result, the appellant succeeds and the appeal is allowed. The order of conviction and sentence passed by the court below against the appellant for the offence under Section 55(a) and (i) of Abkari Act are hereby set aside and the appellant is acquitted of the charge levelled against him giving him the benefit of doubt. He is set at liberty. The bail bond executed by him will stand cancelled. The fine amount if any remitted by the appellant is directed to be returned to him by the court below on making necessary application for that purpose by the accused.

Office is directed to communicate this judgment to the concerned court, immediately.

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