
(2025) 10 KH CK 0022

Kerala HC

Case No: Criminal Appeal No. 1184 of 2010

Prabhu Prakash

APPELLANT

Vs

State Of Kerala

RESPONDENT

Date of Decision: Oct. 9, 2025

Acts Referred:

- Abkari Act, 1 of 1077 — Section 8(2), 38, 53A, 53A(2)(c), 67B

Hon'ble Judges: Johnson John, J

Bench: Single Bench

Advocate: P.Mohamed Sabah, Saipooja, Faizel K., Hasnamol N.S

Final Decision: Allowed

Judgement

Johnson John, J

1. The appellants are accused Nos. 1 and 2 in S.C. No. 704 of 2007 on the file of the Additional District and Sessions Judge, (Adhoc-III), Kasaragod and they are challenging the conviction and sentence imposed on them for the offence under Section 8(2) of the Abkari Act.

2. The prosecution case is that on 02.10.2006, at about 8.15 p.m., when the Sub Inspector of Kumbala Police Station and party inspected the autorickshaw driven by the first accused along with the second accused as passenger at Mukkarikandam, it is found that the autorickshaw contained 3000 packets of arrack containing 100 ml. each in 6 plastic sacks and the accused are thereby alleged to have committed the offence punishable under Section 8(2) of the Abkari Act.

3. The trial court, after framing charge, examined PWs 1 to 6 and marked Exhibits P1 to P8 from the side of the prosecution and no evidence adduced from the side of the defence.

4. After trial and hearing both sides, the trial court found both the accused guilty of the offence under Section 8(2) of the Abkari Act and sentenced them to undergo rigorous imprisonment for 4 years and to pay a fine of Rs.1,00,000/- each and in default of payment of fine, to undergo rigorous

imprisonment for three months.

5. Heard Smt. Saipooja, the learned counsel for the appellants and Smt. Hasnamol N.S., learned Public Prosecutor.

6. The learned counsel for the appellants argued that PWs 2 and 3, the independent witnesses examined by the prosecution, turned hostile and a perusal of Exhibit P2, seizure mahazar, and Exhibit P7, property list, would show that the specimen impression of the seal used is not affixed in the seizure mahazar and property list. It is argued that the mandate of Section 53A of the Abkari Act is not complied in this case and that there is also violation of Section 38 of the Abkari Act and that the prosecution has not complied with the procedural requirements for ensuring tamper proof collection of samples and production of the same in the Chemical Examiner's Laboratory in a fool proof condition and therefore, the appellants are entitled for the benefit of reasonable doubt.

7. The learned Public Prosecutor argued that the evidence of PW6, Sub Inspector who detected the offence, is supported by the evidence of PW1, Police Constable, and Exhibit P5, report of the chemical analyst, would show that ethyl alcohol was detected in the samples and there is no reason to interfere with the findings in the impugned judgment.

8. PW6 is the Sub Inspector who detected the offence and PW1 is the Police Constable who accompanied PW6 and regarding the occurrence, they were deposed in accordance with the prosecution case. PWs 2 and 3, the independent witnesses examined by the prosecution, turned hostile to the prosecution stating that they have not witnessed the alleged occurrence.

9. According to PW6, after arresting accused Nos. 1 and 2, he took samples of the contraband in two bottles of 375 ml. capacity. Even though, PW6 stated that he affixed label and sealed the sample bottles by using the seal of the SHO, he has not deposed anything regarding the nature of the seal used. It is pertinent to note that the specimen impression of the seal is not seen affixed in Exhibit P2, seizure mahazar, or Exhibit P7, property list.

10. The prosecution has no case that representative samples of the contraband liquor were drawn in the presence of the Magistrate as required under Section 53A(2)(c) of the Abkari Act. Section 53A of the Abkari Act, inserted by Act 1 of 2003 with effect from 03.09.2002, reads thus:

53A. Disposal of seized liquor, intoxicating drugs or articles. - (1) Notwithstanding anything contained in this Act, the State Government may having regard to the nature of the liquor, intoxicating drug, or article, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant consideration, by notification in the official Gazette, specify such liquor, intoxicating drug or article which shall, as soon as may be after their seizure, be disposed of by the authorised officer referred to in section 67B, in such manner as the Government may, from time to time determine after following the procedure hereinafter specified.

(2) Where any such notified liquor, intoxicating drug or, article has been seized under this Act, the authorised officer shall prepare an inventory of such liquor, intoxicating drug or article containing such details relating to their description, quality, quantity, mode of packing, marks, numbers of such other identifying particulars of the liquor, intoxicating drug or article or the packing containers in which they are kept, place of origin and other particulars, as

the authorised officer may consider relevant to identify the liquor, intoxicating drug or article in any proceedings under this Act and make an application to any Magistrate having jurisdiction over the area where the seized liquor, intoxicating drug or articles or stored for the purpose of,-

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of such liquor, intoxicating drug or article and certifying such photographs as true; or

(c) allowing to draw representative samples of such liquor, intoxicating drug or article in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2) the Magistrate shall, as soon as may be, visit the place where such liquor, intoxicating drug or articles are stored and take appropriate steps as specified in clauses (a), (b) and (c) of sub-section (2), and allow the application.

(4) Where any liquor or intoxicating drug or article under this Act has been kept under the custody of any court in connection with any offence committed under this Act, before the commencement of the Abkari (Amendment) Act, 2003 or has been brought before a Magistrate without complying the procedure laid down in sub-section (2), the authorised officer shall obtain prior permission of the Court or Magistrate before initiating proceedings under sub-section (2).

(5) Notwithstanding anything contained in the Indian Evidence Act, 1872 (Central Act 1 of 1872) or the Code of Criminal Procedure, 1973 (Central Act 2 of 1974) any Court trying an offence under this Act, shall treat the inventory, the photographs of liquor, intoxicating drug or article and any list of samples drawn under sub sections (2) and (4) and certified by the Magistrate, as primary evidence in respect of such offence.

Explanation. - 'Article' for the purpose of this section includes jaggery and other like substances, the value of which depreciates in passage of time.■

11. In *Andikutty v. State of Kerala* [2023 KHC 777], this Court held that the mandate of Section 53A has to be complied with in its letter and spirit and if there is violation of Section 53A, the entire prosecution case will vitiate on that ground itself.

12. The decision of this Court in *Vijayan @ Puthoor Vijayan v. State of Kerala* [2021 (5) KHC 347] shows the steps to be followed by the officer collecting the sample, thondi clerk who is authorised to receive the thondi and the measures to be ensured by the chemical examiner. The same reads as under:

"Steps to be followed by the officer collecting the sample:

- (i) Collection of sample from the alleged contraband by the Officer concerned shall be transparent eschewing possibility of tampering the sample in any manner;
- (ii) While collecting sample, the officer shall describe the nature of the specimen seal in the mahazar and the specimen seal shall be affixed on the mahazar, on the sample bottle, bottle containing the remaining part of contraband and the forwarding note;
- (iii) The sample so collected shall be produced before the jurisdictional Magistrate without any delay and the delay if any, shall be properly explained;
- (iv) Specimen seal affixed on the sample should be produced before the court along with the contraband for comparison;
- (v) The said officer shall depose about compliance of the above before the court while giving evidence.

Steps to be followed by the Thondy Clerk who is authorised to receive the thondy:

- (i) The Thondy Clerk shall verify the specimen seal produced before the court and to compare the same with a seal affixed in the mahazar, collected sample and in the forwarding note to ensure that the seal of the sample is intact and there is no scope for tampering the same in between its collection and production before the court;
- (ii) While forwarding the sample to the laboratory, the Thondy Clerk shall ensure that specimen sample seal is affixed on the forwarding note;
- (iii) The forwarding letter shall contain the name of the official who is entrusted to handover the sample to the Chemical Examiner;
- (iv) Specimen seal also to be provided to the Chemical Examiner for verification and to ensure that the specimen seal, so provided, is tallying with the seal affixed on the sample, to rule out the possibility of tampering while on transit of the sample;
- (v) Thondy Clerk must be examined to prove compliance of the above, also to prove that he has been in custody of the sample from the date of receipt of sample till the date of forwarding and also to prove compliance of item No.(i) to (iv) steps stated hereinabove.

Measures to be ensured by the Chemical Examiner:

- (i) Chemical Examiner shall ensure production of specimen seal to verify as to whether the specimen seal provided in the forwarding note and the sample forwarded are tallying to rule out tampering of a sample during transit;
- (ii) In the chemical analysis report the said fact shall be stated so as to act upon the same without examining the Chemical Examiner as provided under S.293 Cr.PC."

13. The prosecution has a duty to prove that it was the sample taken from the contraband liquor which was allegedly seized from the accused, ultimately reached the hands of the chemical examiner, in a fool proof condition, as held by this Court in *Sasidharan v. State of Kerala* [2007 (1) KLT 720=2007 KHC 3404].

14. In this case, even though Exhibit P8, copy of the forwarding note, is dated 03.10.2006, Exhibit P5, report of the chemical examiner, would show that the sample was produced in the Chemical Examiner's Laboratory only on 26.10.2006 and the prosecution has not examined the property clerk of the court or the Police Constable to prove the tamper proof despatch of the sample to the laboratory.

15. In *Antony v. State of Kerala* [2024 KHC OnLine 1082], this Court held that the prosecution has a legal obligation to prove that it was the contraband substance allegedly seized from the possession of the accused, eventually reached the Chemical Examiner's laboratory in a tamper proof condition and that the prosecution has also to prove the chain of custody of the contraband commencing from the place of occurrence upto the production of the same before the Chemical Examiner's Laboratory. It was further held that where the sample changed several hands before reaching the chemical examiner, the prosecution has a duty to examine the various officials who handled the sample to prove that while in their custody, the seals on the sample have not been tampered with.

16. It is well settled that the prosecution can succeed only if it is proved that the sample which was analyzed in the Chemical Examiner's Laboratory was the very same sample which was drawn from the contraband substance said to have been seized from the possession of the accused.

17. In *Bhaskaran K. v. State of Kerala and another* (2020 KHC 5296), this Court held that the nature of the seal used by the detecting officer shall be mentioned in the seizure mahazar and the specimen of the seal shall be produced in the court so as to enable the court to satisfy the genuineness of the sample produced in the court.

18. In *Rajamma v. State of Kerala* (2014 (1) KLT 506), this Court held that if the specimen of the seal affixed on the bottle containing the sample is not produced before the court and forwarded to the chemical examiner for verification to ensure that the sample seal so provided is tallying with the seal affixed on the sample, no evidentiary value can be attached to the chemical analysis report.

19. In *Vijay Pandey v. State of Uttar Pradesh* (AIR 2019 SC 3569), the Apex Court held that mere production of a laboratory report that the sample tested was the contraband substance cannot be conclusive proof by itself and that the sample seized and that tested have to be co-related.

20. As per Section 38 of the Abkari Act, every Abkari Officer is bound to give immediate information either to his immediate official superior or to an Abkari Inspector and PW6 has no case that he complied the mandate of Section 38 of the Abkari Act in this case. In cross examination, PW6 admitted that after recording the crime number in the arrest memo, he erased

the same and there was no attempt on the side of the prosecution to mark the arrest memo in evidence. PW6 admitted in cross examination that he has not verified the registration certificate of the autorickshaw and he is not aware as to who is the registered owner of the autorickshaw. PW5, who completed the investigation and filed the final report, deposed in cross examination that he has not conducted any investigation to ascertain the correct registration number of the vehicle. He would say that the autorickshaw was in the premises of the Police Station, when he conducted the investigation.

21. As noticed earlier, in this case, there is violation of the mandate of Sections 53A and 38 of the Abkari Act and there is also no satisfactory evidence to establish a fool proof chain of custody to prove that it was the sample taken from the contraband liquor which ultimately reached the hands of the chemical examiner in a fool proof condition and therefore, I find that the appellants are entitled for the benefit of reasonable doubt. Since the trial court failed to consider the above vital aspects while appreciating the evidence, the conviction and sentence passed by the trial court cannot be sustained.

In the result, this appeal is allowed. The conviction and sentence imposed by the trial court against the accused/appellants is hereby set aside and they are acquitted of the offence under Section 8(2) of the Abkari Act. Bail bonds executed by the appellants shall stand cancelled and they are set at liberty forthwith.