# Beerankutty Vs The State of Kerala

**Court:** High Court Of Kerala

**Date of Decision:** Sept. 16, 2014

**Acts Referred:** Criminal Procedure Code, 1973 (CrPC) â€" Section 102, 105, 165, 232, 313

**Hon'ble Judges:** K. Ramakrishnan, J

**Bench:** Single Bench

**Advocate:** Babu S. Nair, Advocate for the Appellant; K.K. Rajeev, Public Prosecutor, Advocate for the Respondent

## Judgement

K. Ramakrishnan, J.
Accused in SC. No. 312/2000 on the file of the Additional Sessions Judge (Fast Track No-I), Manjeri is the

appellant herein.

2. The appellant was charge sheeted by the Assistant Sub Inspector of Police, Kondotty police station in Crime No. 373/1999 of that police

station alleging commission of the offence under section 55(a), 55(b) and 55(g) of Abkari Act.

3. The case of the prosecution in nutshell was that on 10.7.1999 at about 2.15 p.m., the accused was found to be in possession of wash, a

material used for manufacture of arrack and engaged in distillation of arrack from the building owned by one Abdul Rahiman, Chemmalaparambu

in violation of provisions of the Abkari Act and thereby he had committed the offence punishable under section 55(a), 55(b) and 55(g) of the

Abkari Act.

4. It was detected by PW 1 the Sub Inspector of Police and after examination of the articles, and complying the formalities of taking sample,

sealing of the same etc., he seized the articles as per Ext. P1 seizure mahazar and arrested the accused and prepared Ext. P3 arrest memo and

thereafter came to the police station and prepared Ext. P2 report and registered Ext. P2(a) First Information Report as Crime No. 373/1999 of

Kondotty police against the appellant. The investigation was conducted by PW 5, the Assistant Sub Inspector of Police. He went to the place of

occurrence and prepared Ext. P6 scene mahazar in the presence of PW 4 and he sent Ext. P7 forwarding note with a request to send the sample

for analysis and samples were sent to the chemical examiners laboratory from court and Ext. P8 chemical analysis report was obtained. The search

was conducted in the presence of PW 2, the head constable accompanied PW 1 and independent witness PW 3. After completion of

investigation, PW 5 filed final report before the Judicial First Class Magistrate Court, Malappuram and the learned magistrate has taken cognizance

of the case as CP. No. 39/2000 and thereafter the learned magistrate committed the case to the Court of Sessions, Manjeri and the learned

Sessions Judge has taken cognizance of the case as SC. No. 312/2000 and made over the case to Additional Sessions Court, (Fast Court No-I),

Manjeri for disposal.

5. When the appellant appeared before the court below, after hearing the learned counsel for the appellant and the Additional Public Prosecutor of

that court, the learned Additional Sessions Judge framed charge under section 55(a), 55(b) and 55(g) of the Abkari Act against the appellant 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 5 were examined

and Exts. P1 to P8 and P2(a) and MO1 series and MO2 series were marked on the side of the prosecution. After closure of the prosecution

evidence, the accused was questioned under section 313 of the Criminal Procedure Code (hereinafter called the Code) and he denied all the

incriminating circumstances brought against him in the prosecution evidence. He had further stated that he has been falsely implicated in the case.

He had further stated that Abdul Rahiman was conducting a hotel in that building and he is only a coolie worker in that hotel. Since the evidence in

this case does not warrant an acquittal under section 232 of the Code, the learned Additional Sessions Judge directed the accused to enter on his

defence. But no defence evidence was adduced on the side of the appellant. After considering the evidence on record, the court below found the

appellant guilty under section 55(a), 55(b) and 55(g) of Abkari Act and convicted him thereunder and sentenced him to undergo rigorous

imprisonment for five years and also to pay fine of Rs. one lakh in default to undergo simple imprisonment for one year. Aggrieved by the same, the

present appeal has been preferred by the appellant, accused in the lower court.

6. Heard the counsel for the appellant and the learned Public Prosecutor.

7. The counsel for the appellant submitted that the seizure has not been properly proved and there was no evidence to show that the sample was

sealed from the place of detection itself. Further, there was a delay in sending the samples to the court which has not been explained. Further, the

investigation was conducted by Assistant Sub Inspector, who is not an abkari officer and as such the entire prosecution case is vitiated as the

investigation was conducted by incompetent person and on the basis of charge sheet filed by such person, no conviction can be entered into and

the same is liable to be set aside and he is entitled to get acquittal.

8. On the other hand, the learned Public Prosecutor submitted that the evidence of PWs 1, 2 and 5 will go to show that the seizure was proved

beyond reasonable doubt and there is no necessity to falsely implicate the appellant in a case like this. In the absence of evidence adduced on the

side of the appellant to prove false implication, the presumption under section 64 of the Abkari Act will be attracted and the court below was

perfectly justified in convicting the appellant for the offence alleged.

9. The case of the prosecution was that on 10.07.1999, PW 1, the Sub Inspector of Police Kondoty police station got an information that illicit

distillation of arrack was being done from the tea shop conducted in the building belonging to one Abdul Rahiman and accordingly, he went to the

spot along with PW 2, the head constable attached to that police station and the independent witness PW 3 and he found the accused engaged in

distillation of arrack and he examined the vessels and found huge quantity of wash in the vessel and some arrack was also seen which was illegally

distilled by the accused. Thereafter, he had taken sample from the arrack as well as the wash, sealed the same and seized the sample as well as

MO1 series and MO2 series vessels as per Ext. P1 mahazar in the presence of PW 3, independent witness who had turned hostile and he had

denied having witnessed the seizure. According to PW 1, he had prepared the search memorandum and entrusted the writer of the station for

forwarding the same to the court. But unfortunately in Ext. P1 seizure mahazar, nothing was mentioned about the preparation of any search

memorandum before going to the place of search as contemplated under section 102 r/w section 105 of the Code as claimed by PW 1 in his

evidence. Further, section 36 of the Abkari Act also says that as far as possible the procedure contemplated under section 165 of the Code has to

be complied with while conducting search of the building. It is true that in Ext. P2 report, it was mentioned about the same which was prepared

after he reached the police station along with the alleged contraband articles alleged to have been seized from the possession of the accused. So it

cannot be said that prosecution has proved beyond reasonable doubt that the search conducted was legal as contemplated under section 36 of the

Act or under section 102 of Code of Criminal Procedure.

10. Further, it is seen from the evidence of PW 1 that immediately after reaching the police station, he had entrusted the articles to PW 5 to

conduct the investigation. He had no case that he had prepared the property list. It is seen from Ext. P4 property list that it was prepared on

14.07.1999 though the seizure was affected on 10.07.1999 and the property list was prepared by the Sub Inspector of Police who detected the

crime. He had no case that he was in possession of these articles after it was entrusted to PW 5. PW 5 also had no case that these articles were in

the possession of PW 1 himself till it was produced before the court. It is seen from Ext. P4 property list that the articles were produced before the

court on 15.07.1999 that is after five days of the alleged seizure. So, there is no convincing evidence adduced on the side of the prosecution to

prove that after seizure till it was produced before court the contraband articles were in the possession of either PW 1 or PW 5 so as to convince

the court that it was produced before the court with tamper proof and in the absence of such evidence it cannot be said that the same articles

which had been seized from the possession of the accused had been produced before court and Ext. P8 report relates to that article. Unless this is

proved, conviction of accused is not possible for possession of the contraband articles of the contraband articles. It has been so held in the

decision reported in (Sasidharan V. State of Kerala) (2007(1) KLT 720) and also Manikantan Pillai Vs. State of Kerala, .

11. Further, in this case it is seen from the evidence of PW 5 and PW 1 that the investigation was conducted by Assistant Sub Inspector of Police

who is not an abkari officer, authorised to conduct investigation or detection under section 50 to 53 of the Act. Further, as per SRO No.

321/1996, Government designated certain officials as abkari officials to exercise the power under section 31, 32, 33, 34, 35, 38, 40, 41, 42, 43,

44, 45, 46, 47, 48, 49, 50, 51, 52, 53 and 59 of the Act and as regards the police officers are concerned, it has been mentioned in the notification

that all police officers of and above the rank of Sub Inspector of police in charge of law and order and working in the general executing branch of

police department, alone are entitled to exercise the power of Abkari officer under the Act. So it is clear from this that the person has been

designated as abkari officer as per the notification is persons having the rank of Sub Inspector of Police and above and not other persons. So PW

5 will not be coming under the category of abkari officer entitled to conduct investigation and lay final report in this case.

12. The effect of such filing of final report by Assistant Sub Inspector of Police has been considered by the Division bench of this court in the

decision reported in Subash Vs. State of Kerala and it has been held in the decision that if a final report has been filed by Assistant Sub Inspector

of Police, who is not an Abkari officer as defined under the Act, the trial will be vitiated and the conviction is unsustainable in law. It was also

mentioned in the decision that if evidence has not been started, then accused can be discharged and the defective final report filed can be returned

for curing the defect and file the same by an Abkari officer authorised as per the notification and defined under the Act. The same principle has

been followed by this court in another decision reported in Hashim T.K. Vs. Assistant Sub Inspector, Chandera Police Station and Another, and

the benefit of that decision has to be given to the accused and he has to be acquitted. So, considering the circumstances since the investigation was

conducted by an officer who is not abkari officer and not competent to conduct investigation and filed final report the trial is vitiated and that

benefit must be given to the accused.

13. Though the cognizance was taken on defective charge sheet, since this court found that the seizure and sampling etc are not proper and the

prosecution has not proved that the articles seized was the same article which was sent to court, this court feels that the appellant is entitled to get

acquittal on those grounds and considering the fact that the case is of the year 1999 making an order of discharge will only cause unnecessary to

prejudice to the accused. So, the appellant is entitled to get acquittal of the charge levelled against him giving him the benefit of doubt. In view of

the discussion made over, the conviction entered by the court below is unsustainable in law and the same is liable to be set aside and I do so.

14. In view of the finding that the conviction is not sustainable in law, the sentence imposed by the court below is also illegal and hence the same is

also set aside.

In the result the appeal is allowed and the order of conviction and sentence passed by the court below against the appellant in SC. No. 312/2000

on the file of Additional Sessions Court (Fast Track-I) Manjeri under section 55(a), (b) and (g) of Abkari Act are set aside and the appellant is

acquitted of the charge levelled against him giving him the benefit of doubt. The appellant is set at liberty. The bail bond executed by him will stand

cancelled. The fine amount if any deposited as directed by this court is directed to be returned to the appellant by the learned magistrate on making

application by the appellant before that court for this purpose.

Office is directed to communicate this judgment to the court below immediately.