

IN THE COURT OF SESSIONS, KOZHICODE DIVISION

Present: Smt. Leena Rasheed, Principal Asst. Sessions Judge, Kozhikode.

Saturday, the 29th day of June, 2024

SESSIONS CASE NO:942/2022

(C.P.No. 12/2022 of the JFCM V Kozhikode)

Name of accused	Surendran
Charge	U/s. 55(1) of Abkari Act 1 of 1077
Plea of the Accused	Not guilty.
Finding of the Judge	Not guilty.
Sentence or Order	Acquitted U/s.235 Cr.P.C
Crime No and name of Police Station	Crime No. 123/2022 of Marad Police Station
Prosecution conducted by	Adv. Robin Thomas Addl. Public Prosecutor, Kozhikode.
Accused Defended by	Adv. Joseph Thomas

This case was made over to this court by Sessions Judge, Kozhikode for disposal.

1. Serial Number	S.C. No. 942/2022
2.Crime number and Name of Police station	Crime No. 123/2022 of Marad Police Station

DESCRIPTION OF THE ACCUSED

Sl. No	Name	Father's Name	Cast e & race	Occupation	Residence	Age
1	Surendran	Krishnan	-	-	Idamoli House, Kalikkunnath Sivakshethram Road, Perachanangadi, Naduvattom, Beypore (PO), now residing in the line room of Anilkumar, Naduvattom.	57/22

DATE OF

9. Occurrence	10.03.2022
10. Complaint	21.04.2022
11. Apprehension	11.03.2022
12. Released on bail	25.03.2022
13. Commitment	16.09.2022
14. Commencement of trial	18.08.2023
15. Close of trial	20.06.2024
16. Judgment	29.06.2024
17. Explanation of delay	Received the records from the Sessions Court, Kozhikode on 22.10.2022 posted for the appearance of the accused to 09.01.2023 Charge framed on 18.08.2023 and Evidence commenced on 18.08.2024 and closed on 20.06.2024 and posted for judgment to 20.06.2024. Judgment pronounced on 29.06.2024

J U D G M E N T

This is a case taken on file based on the final report filed by the Sub Inspector, Marad Police Station, alleging that the accused committed the offence punishable under Section 55(i) of the Abkari Act.

2. The prosecution case is that on 10-03-2022 at around 6 p.m, near Revathi Ice Plant, Kuthukallu Junction, Beypore, the accused was found in possession of 4 bottles of 500 ml each Malabar House Premium VSOP Brandy and 12 bottles of Courier Napoleon Gold Brandy, for the purpose of sale, in his scooter bearing registration No.KL-11-BF-1639, in contravention of the provisions of the Abkari Act and Rules. The accused is thus alleged to have committed the offence punishable under the provision herein above mentioned.

3. On his appearance before the committal court, the learned Magistrate furnished copies of all relevant records to the accused, and committed the case to the Honorable Court of Session, Kozhikode, for trial. Thereupon, the case was made over to this court for disposal.

4. Accused appeared before this court. He is on bail. The learned Additional Public Prosecutor opened his case by describing the charge brought against the accused and stated by what evidence he proposed to prove the guilt of the accused.

5. After hearing both sides and perusing the case records, charge under Section 55(i) of the Abkari Act was framed against the accused, and read over and explained to him in Malayalam to which, he pleaded not guilty.

6. PWs.1 to 6 were examined, Exhibits P1 to P12, and MOs.1 to 3 were marked on the side of prosecution.

7. On closing the prosecution evidence, the accused was examined under Section 313(1)(b) of the Code of Criminal Procedure. He denied all the incriminating circumstances appeared in evidence against him, and pleaded innocence.

8. Thereafter, the prosecution and defence were heard under Section 232 of the Code of Criminal Procedure. Since this court did not consider that there was no evidence that the accused committed the offence alleged against him, he was not acquitted under Section 232 Cr.PC., and instead, he was called upon to enter his defence and adduce any evidence he may have in support thereof.

9. No defence evidence was adduced in this case.

10. The points arose for consideration are:

- (i). Whether the accused sold Indian made foreign liquor and thereby committed the offence punishable under Section 55(i) of the Abkari Act?.

(ii). What shall be the punishment, if any, to be awarded to the accused?.

11. Heard both sides.

12. **Point No.(i):-** According to the prosecution, on 10-03-2022 at around 6 p.m, while PW2 the Sub Inspector of Police of Marad Police Station was conducting law and order patrolling duty along with police party, he received a secret information about sale of Indian made foreign liquor near Marad Revathi Ice Plant. Hence along with police party he proceeded to the place of occurrence, where he found the accused handing over a glass containing red colour liquid to another person. Doubting the same as something illegal, PW2 stopped the vehicle and approached the accused. Seeing them, the buyer ran away. In the presence of two witnesses, PW2 searched the vehicle and found a 500 ml bottle of Malabar House Premium VSOP Brandy containing 300 ml liquor. The contents were tasted and smelled and PW2 was convinced that it was Indian made foreign liquor. Thereafter he searched a bag found on the footboard of scooter and found three other 500 ml bottles of Malabar House Premium VSOP Brandy. One of the bottle was opened and its contents were also confirmed by smelling and tasting. Thereafter under the seat he found twelve 500 ml bottles of Courier Napoleon Gold Brandy. One of the bottle was opened and its contents were also verified by smelling and tasting. An amount of Rs.1200/- was also seized from the accused. The accused was arrested as per Ext.P5 arrest memo and the samples were sealed and labelled as per law and the same were marked as S1 to S3 and the remaining properties were marked as P1 to P13. The contraband along with the vehicle, disposable glass and the cover in which the liquor was found were taken into custody as per Ext.P2 seizure mahazar in which PW2 affixed the SHO seal. Thereafter he proceeded to the police station along with accused and contraband and registered

Ext.P3 FIR against the accused. The properties were produced before the court as per Ext.P4 property list and Ext.P6 is the photographs of the contraband seized from accused. He identified the disposable glass, water bottle and also a cover seized from accused and the same were marked as MOs.1 to 3 before court.

13. PW3 accompanied PW2 during the seizure, and he also deposed in tune with the version of PW2 about the alleged seizure of contraband and an amount of Rs.1200/- from the possession of the accused. The same was sealed and labeled as per law, and the properties were taken into custody as per Ext.P2 seizure mahazar in which, he also was a witness.

14. PW1 was the Joint Transport Officer at Kozhikode who on 24-03-2023 as per the requisition received from Marad Police Station issued Ext.P1 RC particulars of vehicle bearing Registration No.KL-11-BF-1639. According to him, the registered owner is one Mr.Sanal. PW4 is a signatory to Ext.P7 scene mahazar and PW5 is the Village Assistant at Beypore village office, who on requisition made by the investigating official prepared Ext.P8 site plan. PW6 is the investigating official, who recorded the statement of the witnesses and prepared Ext.P7 scene mahazar and also prepared Ext.P9 forwarding note for sending the sample for analysis. For preparing the inventory the remaining property were produced before Deputy Excise Commissioner, who prepared Ext.P10 inventory and on its basis the Executive Magistrate had issued Ext.P11 correctness certificate. He identified Ext.P6 photographs of the articles and the relevant portion of the endorsement by Executive Magistrate on the photograph is marked as Ext.P12. The chemical analysis report which detected the presence of ethyl alcohol in the sample was marked as Ext.P12. He concluded the investigation and filed final report before court.

15. On the basis of the above materials, the learned Additional Public Prosecutor submitted that the accused was caught from a public place while selling liquor. The convincing oral testimony of PW2, who was accompanied by PW3, proves the seizure of Indian made foreign liquor from the possession of the accused. They deposed to have seen the accused engaged in the act of sale of liquor. In this connection, the contraband and an amount of Rs.1200/- were seized from the possession of the accused. So, the Prosecutor submitted that the evidence indicates sale of items which attracts offence under Section 55(i) of the Abkari Act. Sufficient materials are produced by the prosecution to establish its case is the submission of the learned Additional Public Prosecutor.

16. On the other hand, the learned counsel for the accused submitted that the prosecution miserably failed to prove the charge leveled against the accused, and the prosecution case is unbelievable. The learned counsel contended that it is not possible to sell liquor as alleged by the investigating officer at the alleged place, and at the alleged time. The learned counsel submitted that the prosecution failed to prove the alleged acts committed by the accused.

17. In this case the prosecution failed to examine any independent witness to the occurrence to corroborate the testimony of the detecting official. The alleged buyer to whom accused is alleged to have sold the liquor could not be intercepted. PWs 2 and 3 had no case that they had seen the accused receiving the currency from the buyer. So there is nothing in evidence to prove that the accused was conducting sale of Indian made foreign liquor as alleged by the prosecution. Learned prosecutor submitted that even if the sale is not proved there is evidence to show that the accused is in possession of Indian made foreign liquor which is alleged to have seized from a cover and also from under the seat of vehicle of accused bearing registration No.KL-11-

BF-1639. It is worthwhile to note that as per Ext.P1 registration particulars produced by PW1 the owner of the vehicle is one Mr. Sanal. There is nothing on record to prove that the vehicle belongs to accused or the registered owner is anyway connected to accused as alleged by prosecution.

18. After considering the rival submissions and the materials before the court, it appears that there is some force in the submissions advanced by the learned defence counsel. The Honorable High Court of Kerala, in ***K.Baiju and others v. State of Kerala[Manu/KE/1173/ 2021]***, has held that in order to attract Section 55(i) of the Abkari Act, the prosecution has to prove that the accused person sells or stores for sale liquor or any intoxicating drug. However, in this case, the person to whom the accused allegedly sold liquor could not be intercepted. Prosecution failed to examine any independent witness to prove the incident.

19. In ***Soman v. State of Kerala[Manu/KE/2012/2020]***, the accused was convicted for offence under Section 55(i) of the Abkari Act. A glass tumbler and Rs.80/- were seized from the possession of the accused. However, the Honorable High Court held that there is no foolproof evidence for the sale, and the produced evidence sounds artificial. The Honorable High Court further held that the prosecution has put stereotype version with the supporting testimony given by the investigating official. The Honorable High Court acquitted the accused by holding that *“merely for the reason that the prosecution has shown that the accused had carried a glass tumbler along with the contraband or he had, it cannot be presumed that he was engaged in the sale of liquor. There is also no allegation that he had such criminal antecedents to his credit. Though it was vaguely stated that two persons who were standing near to him were his customers, no attempt was made either to intercept them or to enquire their identity. In this setting, in my opinion, basing on the solitary evidence of PW1, this part of*

prosecution version cannot be believed, and the offence alleged under Section 55(i) of the Abkari Act cannot be found against him.”.

20. Here in this case also, the aforesaid dictum is squarely applicable. The alleged buyer could not be traced during investigation. PW2 merely deposed that he affixed seal, but, the nature and description of the seal he affixed on the sample bottles was not given in evidence. The Honorable High Court, in ***Vijayan v. State of Kerala[Manu/KE/1551/2021]***, held that the aforesaid vague statement would not make the prosecution case convincing.

21. It has also come out in evidence that the detecting officer had not informed the alleged offence to his superior officer, and thereby, not complied with Section 38 of the Abkari Act. Therefore, the evidence let in would show that the prosecution has failed to prove the requisite formalities contemplated by the Abkari Act so as to prove the charge leveled against the accused. The learned Prosecutor submitted that corroboration from independent witnesses is not necessary to prove the prosecution case. The oral evidence given by the officials and the documents prepared by the investigating official convincingly proved the arrest and seizure of articles from the possession of the accused. At this juncture, it is profitable to consider the following decisions rendered by the Honorable High Court of Kerala. In ***P.Balan v. SHO, Kolavallur Police Statiion[Manu/KE/1594/2020]***, it is held that the evidence of police or excise officer cannot be disregarded merely on the ground of their desire to see the success of the case. However, the prudence requires that the evidence of such officers who are interested in the outcome or the result of the case shall be carefully scrutinized and independently appreciated.

22. In this case, apart from the aforesaid lapse, there are other illegalities in the prosecution case which also make the prosecution case against the accused

unsustainable. The property involved in this case was received at the laboratory on 25-03-2022. But, the chemical examiner's report was dated 30-10-2023. There is a delay in the analysis of the sample. It is not explained by the prosecution. It is now well settled that the aforesaid delay is fatal to the prosecution. In ***Rajan v. State of Kerala***[Manu/KE/1870/2021], the Honorable High Court held that the delay of more than nine months in the analysis of sample was not explained. In the aforesaid circumstance, the unexplained delay of more than two years in the analysis of sample made the prosecution case against the accused unsustainable.

23. Likewise, in ***Mahesh.M.K. v. State of Kerala***[2017(1) KHC 120], it is pointed out that court should be very careful and cautious in cases where the court was called upon to decide the guilt of the accused on the evidence of official witnesses alone who themselves detected the alleged offence. At this juncture, it is further significant to note here in this case that the independent witness examined by the prosecution failed to prove that the accused was arrested from the alleged place. In ***Mukundan v. State of Kerala***[Manu/KE/1215/2016], there is no independent corroboration to the alleged seizure of arrack. The Honorable High Court of Kerala held that when the provisions of the statute are strict and the punishment is very high, more care and caution is highly necessary. Hence, the provisions of Abkari Act have to be interpreted in a strict sense. In ***Ramankutty v. Excise Inspector***[Manu/KE/016/2021], the Honorable High Court has held that due to lack of any credible independent evidence to prove the search and seizure of the contraband, the prosecution story becomes doubtful, and the accused is entitled to be given the benefit of doubt. Accordingly, it is not possible to hold that the prosecution convincingly established the connection of the accused with the contraband and also his arrest from the alleged

place. Therefore, the accused is entitled to an acquittal. Hence, point No.(i) is found against the prosecution.

24. **Point No.(ii)** :- In view of my finding on point No.(i) as above, the accused is found not guilty of the offence punishable under Section 55(i) of the Abkari Act. This point is so found.

In the result, the accused is acquitted of the offence punishable under Section 55(i) of the Abkari Act as provided under Section 235 of the Code of Criminal Procedure. His bail-bond stands canceled, and he is set at liberty. MO.1 to 3 are ordered to be destroyed after the expiry of appeal period.

[Dictated to the Confidential Assistant, transcribed and typed by her, corrected by me, and pronounced in open court on this the 29th day of June, 2024].

sd/-
Principal Assistant Sessions Judge.

Prosecution Witnesses

PW1	20.09.2023	M.P Dinesan (RTO officer)
PW2	20.02.2024	Sasikumar K.V, SI of Police
PW3	19.03.2024	Arjun.P, CPO, Marad Police Station
PW4	19.03.2024	Vijesh. P, S/o. Girijan.P
PW5	02.04.2024	Sujith N, Village Assistant, Beypore Village
PW6	02.04.2024	Rajesh Kumar.N, SI Marad Police Station

Prosecution Exhibits:

P1	24.03.2022	Vehicle Particulars(Rc)
P2	10.03.2022	Seizure Mahazar
P3	10.03.2022	FIR
P4	10.03.2022	Property list

P5	10.03.2022	Arrest and Inspection memo
P6	-	Photographs
P6(a)	-	Sign of executive magistrate
P7	11.03.2022	Scene mahazar
P8	02.04.2022	Site plan
P9	25.03.2022	Forwarding note
P10	10.03.2022	Inventory list
P11	18.04.2022	Correctness certificate
P12	30.10.2023	Chemical Analysis certificate

Defence Witness and Exhibits :-

Nil

Material Objects:

MO1 - Disposal Glass
MO2 - Watter Bottle
MO3 - Cloth Bag

*sd/-***Principal Assistant Sessions Judge.***//True Copy//***Principal Assistant Sessions Judge.***Typed by : Vsl*

Copy/Fair Judgment in
SC.942/2022
Dated: 29.06.2024