

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOMAS P.JOSEPH

MONDAY, THE 31ST JANUARY 2011 / 11TH MAGHA 1932

CRL.MC.NO. 108 OF 2011()

**(CR NO.12 OF 2010, EXCISE RANGE OFFICE,
KODUNGALLUR THRISSUR DISTRICT)**

PETITIONER(S): ACCUSED 1 & 2

- 1. SUDHAKARAN, S/O.KUMARAN,
NADUMURI, SREENARAYANAPURAM DESOM,
SREENARAYANAPURAM VILLAGE, KODUNGALLUR TALUK,
THRISSUR DISTRICT.**
- 2. MANEESH, S/O.MOHANAN,
KILLIKULANGARA HOUSE, KOOLIMUTTOM DESOM,
KOOLIMUTTOM VILLAGE, KODUNGALLUR TALUK,
THRISSUR DISTRICT.**

**BY ADV. SRI.C.C.THOMAS, SENIOR ADVOCATE
SRI.NIREESH MATHEW**

RESPONDENT(S): COMPLAINANT

**STATE OF KERALA REPRESENTED BY
EXCISE INSPECTOR, EXCISE RANGE OFFICE,
KODUNGALLUR, THRISSUR DISTRICT REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.**

BY PUBLIC PROSECUTOR SHRI K.K. MOHAMMED ANZAR

**THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION
ON 31/01/2011 ALONG WITH CRMC NO. 116 OF 2011 AND
CRMC NO. 121 OF 2011 THE COURT ON THE SAME DAY
PASSED THE FOLLOWING:**

“C.R.”

THOMAS P.JOSEPH, J.

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Crl. M.C. Nos.108, 116 & 121 of 2011
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Dated this the 31st day of January, 2011

ORDER

Question raised for a decision in these petitions is whether, based on the report of chemical examination on the second sample produced by the Investigating Officer in court under Rule 8 (3) of the Kerala Abkari Shops Disposal Rules (for short, “the Rules”) prosecution launched against the accused based on the report of chemical examination on the first sample could be quashed?

2. Short facts necessary for a decision of the question are: Petitioners are the accused in cases registered by the Abkari Officer for various offences under the Abkari Act (for short, “the Act”). They are licensees of toddy shops in Kodungallur and Aluva Excise Ranges. The Abkari Officer collected samples of toddy from the shops of the accused. The first samples were subjected to chemical examination on the request of the Abkari Officers and the report (Annexure-C) revealed that it contained Ethyl Alcohol exceeding 8.1% v/v which is the permissible limit under Rule 9(2) of the Rules as amended with effect from 01.04.2007 (The validity

of the said amendment has been upheld by the Division Bench of this Court in **Komalam v. State of Kerala and Others** (2009 [2] KHC 514). The second samples drawn by the Abkari Officers from the said toddy shops (marked 'B') were produced in the courts concerned along with the crime and occurrence reports as required under Rule 8(3) of the Rules. On the request of the accused, the second samples were sent to another laboratory for examination. That laboratory gave the test results - marked Annexure-D in these petitions which said percentage of Ethyl Alcohol in the samples was less than the permissible limit. According to the accused Annexure-D, reports show that no offence is committed. Hence the prosecution against them are to be quashed. It is argued, placing reliance on the decisions in **Girish Kumar v. State of Kerala** (2010 [2] KLJ 444) and Annexure-E, order of this Court dated November 16, 2010 in Crl. M.C. No.4535 of 2010 that the right to get the second sample examined by another expert is a valuable right of the accused notwithstanding that there is no specific provision in the Act or the Rules to send the second sample for such examination. According to the learned Senior Advocate that right having been exercised by the accused and the result being Annexure-D, report which is favourable to the accused, they

could not be prosecuted for the offences mentioned in the crime and occurrence reports. It is further contended that any interpretation in the matter should be in favour of the accused who are facing criminal prosecution. Hence it is requested that the crime and occurrence reports and all proceedings pursuant thereto against the accused be quashed. It is also contended that if the accused are asked to face the trial and ultimately they are acquitted in the light of Annexure-D, report, by that time the valuable rights of accused will be affected. It is pointed out that under Rule 5(1)(a) of the Rules the accused being experienced licensees and in the absence of any other case registered against them other than for offence punishable under Section 56 of the Act, they are entitled to get preference in the subsequent auctions. Now that the Abkari Officers have registered cases against the accused for offences other than one punishable under Sec.56(b) of the Act as well, unless the cases against the accused are quashed their right to get the licence in the subsequent years will be affected. Learned Senior Advocate has placed reliance on the decision of the Supreme Court in **State of Kerala v. Unni** (2007 [1] KLT 151).

3. Learned Public Prosecutor has argued that even if it is assumed that in the light of Annexure-E, order and the decision in

Girish Kumar's case (supra) accused have a right to get the second sample analysed by another Expert, that does not mean that the report of chemical examination on the second sample would supersede the earlier report obtained by the Abkari Officers based on which prosecution was launched. Learned Public Prosecutor pointed out that like the provisions in Section 13(2) of the Prevention of Food Adulteration Act (for short, "the PFA Act") there is no provision in the Act or Rules whereby the report of chemical examination on the second sample supersedes report of chemical examination on the first sample. In that situation the general provision, i.e., Section 293 of the Code of Criminal Procedure (for short, "the Code") should apply. It is open to the investigating agency to prove that analysis of the second sample was not proper or valid or that for any other reason the second report is not acceptable. In such a situation this Court is not justified at this stage in interfering under Sec.482 of the Code and quashing the proceedings against the accused, it is contended.

4. Rule 8(2) of the Rules prescribes the procedure to be followed by the Abkari Officer while taking the samples. Under clause (c) of sub-rule (1), the Abkari Officer has to divide the sample into two parts and put each part into separate bottles or

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containers which are properly cleaned and dried. Clause (e) requires him to affix labels marked 'A' and 'B' on each bottle or container. As per clause (f) the sealed bottle or container marked 'A' is to be forwarded to the Chief Chemical Examiner or Joint Chemical Examiner to the Government of Kerala or to any officer authorised by the Government in this behalf.

5. Sub-rule (3) of Rule 8 says:

“(3) On receipt of the Chemical Analysis Report, if any violation of the provisions of the Abkari Act, Rules or conditions of Licence or any adulteration is noticed, a case shall be registered within 24 hours. The sample marked 'B' shall be produced before the concerned court. If no case is registered the sample 'B' shall be destroyed.”

6. In compliance with the said provisions, the first samples (marked 'A') collected from the toddy shops of the accused were sent to the Chemical Examiners Laboratory, Ernakulam, and Annexure-C, report was obtained. That report said that percentage of Ethyl Alcohol in the samples of toddy is in excess of the permissible limit. Based on that report prosecution was launched and the second samples (marked 'B') were produced in the courts concerned. Those second samples were

sent, on the request of the accused to the Chemical Examiners Laboratory, Kozhikode which gave Annexure-D, report that the percentage of Ethyl Alcohol is less than the permissible limit. If Annexure-D report is accepted, it follows that the accused have not committed any offence. Could, in the circumstances the prosecution against the accused be quashed at this stage?

7. Annexure-E, order in Crl. M.C.No.4535 of 2010 and the decision in **Girish Kumar's case** only upheld the right of an accused to have the second sample analysed even in the absence of an enabling provision in the Act or the Rules in that behalf and held that if the Abkari Officer has drawn only one sample, it is not only a violation of a valid right of the accused but in such circumstances the report of examination on the (only one) sample drawn by the Abkari Officer cannot be acted upon. These decisions did not consider the question whether the report on the second sample if favourable to the accused would ipso facto supersede the report on the first sample and lead to annulment of prosecution against the accused. That question was not considered in **State of Kerala v. Unni** (supra) as well, learned Senior Advocate concedes in all fairness.

8. It is relevant to note that so far as the PFA Act is concerned a certificate issued by the Director of Central Food Laboratory shall supersede the report of the Public Analyst.

Section 13(3) of the PFA Act reads:

“13(3) The certificate issued by the Director of the Central Food Laboratory (under sub-section (2B) shall supersede the report given by the Public Analyst under sub-section (1)”.

The proviso to sub-sec.5 of Sec.13 of the PFA Act makes the certificate signed by the Director of the Central Food Laboratory (subject to the exception provided therein) final and conclusive evidence of the facts stated therein. Thus, a report of the Central Food Laboratory supersedes the report of Public Analyst and makes the facts stated therein final and conclusive. In such situation a prosecution launched on the basis of the report of Public Analyst may stand. No such provision is contained in the Act or the Rules. That, the accused has a right, even in the absence of specific provision in the Act or the Rules to have the second sample analysed and test result obtained does not mean that such test result if favourable to him would ipso facto supersede the test result on the first sample.

9. In that event, one has to look into the general provision in Sec.293 of the Code. Under Sec.293(1) of the Code a document purporting to be a report under the hand of a Government scientific expert to whom the section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under the Code, may be used as evidence in any inquiry, trial or other proceedings under the Code. Sub-sec.(2) says that the court may if it thinks fit summon and examine any such expert as to the subject matter of his report. Thus reports on the second samples relied on by the accused are certainly admissible in evidence under Sec.293(1) of the Code in the course of any inquiry, trial or other proceedings in the matter, but the prosecution has the right, under sub-sec.(2) of Sec.293 of the Code to examine the Expert who analysed the second samples and issued the report and prove that analysis on the second samples is not proper or valid (if it has got such a case) or is otherwise not acceptable and hence those reports cannot be relied on. In that situation it could not be said that the report obtained by the Abkari Officer on the first sample is superseded by the report on the second sample. Which of the two reports - whether the one of the first or on the second sample - is acceptable is a matter for decision by the

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court. The question raised is answered as above. The accused cannot request to quash proceeding against them based on the report on the second sample.

These Criminal Miscellaneous Cases fail and are dismissed.

THOMAS P. JOSEPH, JUDGE.

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