



IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE JOHNSON JOHN

FRIDAY, THE 22ND DAY OF AUGUST 2025 / 31ST SRAVANA, 1947

CRL.A NO. 714 OF 2008

AGAINST THE JUDGMENT DATED 07.04.2008 IN SC NO.186 OF 2007 OF
ADDITIONAL SESSIONS COURT/SPECIAL COURT (NDPS ACT CASES), THODUPUZHA

APPELLANT/ACCUSED NO.1:

VANAJA, W/O RAJU, THERARUKUZHAYIL, CHERUTHONI KARA, IDUKKI
DISTRICT.

BY ADV SRI.R.PREM SANKAR

RESPONDENTS/STATE:

STATE OF KERALA, REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 18.08.2025, THE
COURT ON 22.08.2025 DELIVERED THE FOLLOWING:

**'C.R'****JOHNSON JOHN, J.**-----
Crl. Appeal No. 714 of 2008
-----Dated this the 22nd day of August, 2025**J U D G M E N T**

The appellant is the first accused in S.C. No. 186 of 2007 on the file of the Additional Sessions Judge/Special Judge for NDPS Act Cases, Thodupuzha.

2. As per the prosecution case, on 02.08.2005, while the Sub Inspector of Idukki Police Station and party were conducting patrol duty, they got information that the first accused is conducting sale of arrack in her house and accordingly, after forwarding search memorandum to the Magistrate, they reached the house of the first accused at about 4.30 p.m. and searched the house in the presence of the first accused and recovered 2 cans of two litre capacity and a glass from the kitchen. When it is found that the cans contained illicit arrack, the police party attempted to arrest the first accused and then she resisted the arrest and tore her nighty and made loud noise and thereupon, accused Nos. 2 to 4, who are the neighbours of the first accused, reached there with weapons.

3. It is alleged that the second accused was armed with a chopper



and she attempted to inflict cut injury on the head of the Sub Inspector and the third accused pelted stones on his back and head. The first accused beat a Police Constable on his left cheek. The fourth accused threatened to cause the death of the Sub Inspector, if in case he caused the arrest of the first accused and the accused are thereby alleged to have prevented the police party from discharging their official duty. Subsequently, after the arrival of the additional police force, they arrested the accused persons and recovered the contraband items.

4. Before the trial court, when the accused persons pleaded not guilty to the charge, PWs 1 to 12 were examined and Exhibits P1 to P23 and MOs 1 to 6 were marked from the side of the prosecution and no evidence adduced from the side of the defence.

5. After hearing both sides and analysing the evidence, the trial court convicted the first accused for the offences under Sections 353, 332, 506(ii) r/w 34 IPC and Section 8(1) r/w 8(2) of the Kerala Abkari Act. For the offence under Section 8(1) r/w 8(2) of the Kerala Abkari Act, she is sentenced to undergo rigorous imprisonment for four years and to pay a fine of Rs.1,00,000/-; for the offence under Section 353 IPC, she is sentenced to undergo rigorous imprisonment for one year



and to pay a fine of Rs.1,000/-; for the offence under Section 332 IPC, she is sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs.1,000/-; and for the offence under Section 506(ii) IPC, she is sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs.1,000/-. In default of payment of the respective fine amounts, she is ordered to undergo simple imprisonment for six months for each of the defaults and the same is under challenge in this appeal.

6. Even though, accused Nos. 2 to 4 were also convicted and sentenced for the offences under Sections 353, 332 and 506 (ii) r/w 34 IPC, the judgment dated 24.01.2024 in Crl. Appeal No. 837 of 2008 passed by this Court shows that the said accused are no more and their appeal was dismissed as abated.

7. Heard Sri. Jithin Varghese, the learned counsel for the appellant and Smt. Hasnamol N.S., the learned Public Prosecutor.

8. The learned counsel for the appellant argued that the prosecution has not explained the delay in lodging the FIR and there is no evidence to show that accused Nos. 2 to 4 shared a common



intention with the first accused. It is pointed out that no document is produced to show that the Sub Inspector and party were discharging official duty as public servants at the time of occurrence. It is also argued that there is no proper dock identification of the appellant/first accused by PWs 1 to 5, official witnesses who supported the prosecution case.

9. The learned Public Prosecutor argued that there is no reason to suspect the evidence of the official witnesses regarding the occurrence and that their evidence is supported by the seizure mahazar and contraband items recovered and even when separate acts are done by the accused persons in furtherance of their common intention, each of the accused is liable for the result of all the acts. It is also argued that common intention can be inferred from the proved facts and circumstances as the same can develop during the course of an occurrence or at the spot.

10. A perusal of Exhibit P9 FIR would show that the occurrence was at 4.50 p.m. on 02.08.2005 and apart from the alleged possession of the contraband items, the overtact alleged against the first accused is



that she beat Police Constable, Jose Varghese, on his left cheek with hand, when he assisted the Woman Police Constable to arrest the first accused. Exhibit P9 FIR, Exhibit P2 search list, and Exhibit P5 mahazer are seen received in the court only at 3.30 p.m. on 03.08.2005.

11. The learned counsel for the appellant pointed out that the Panchayat number of the house from where the contraband items are recovered is not stated in Exhibit P5, mahazar, and the specimen impression of the seal used is not affixed in the mahazar or Exhibit P4, property list, or Exhibit P2, search list, wherein the sample items are included as serial Nos. 3 and 4. Exhibit P10, copy of the forwarding note, is dated 03.08.2005 and Exhibit P18, report of the chemical examiner, would show that the sample was received in the Chemical Examiner's Laboratory at Ernakulam only on 25.10.2005.

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. When the specimen impression of the seal used is not affixed on the seizure mahazar and not produced before the court to enable the property clerk for comparison, it is not possible to arrive at a conclusion that the sample which reached the Chemical Examiner's Laboratory was the sample taken from the contraband allegedly seized from the



possession of the accused, as held by this Court in ***Moothedath Sivadasan v. State of Kerala*** [2021 (1) KLT 744=2021 KHC 3232].

15. On a perusal of Exhibit P5 mahazar, Exhibit P4, property list, and Exhibit, P2 search list, it can be seen that the specimen impression of the seal used is not affixed in the said documents and therefore, I find 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.

16. The prosecution has not adduced any satisfactory evidence to prove the identity and ownership of the house from where the contraband article was allegedly recovered. It is pertinent to note that the Panchayath number of the house is not stated in Exhibit P5 mahazar. But, in the final report filed after investigation, it is stated that the contraband liquor was recovered from house No. III/231 of Vazhathoppu Panchayath. The evidence of PW8, Panchayath Secretary, and Exhibit P13, residential certificate, shows that Vanaja, Kolamkudiyil, Idukki Colony P.O., is residing in building No. VP III/231. In this connection, it is to be noted that as per the final report filed in this case, the accused is



Vanaja @ Unniyamma, Thevarkkuzhiyil House, Vellakayam, Cheruthonikkara, Idukki.

17. The learned counsel for the appellant pointed out that the prosecution has not produced the copy of the building tax assessment register in the Panchayat and there is no satisfactory evidence as to who is the owner of the house mentioned in Exhibit P13. Exhibit P15 is the report filed by PW10 regarding the correct address of the accused and in the said report, it is stated that at the time when the first accused was arrested, there was no opportunity for verifying her address and subsequently, on verification of the ration card and electoral identity card, it is revealed that her correct address is Vanaja @ Unniyamma, W/o Raju, Kolakudiyil house, Vellakayam, Cheruthony.

18. But, in spite of filing Exhibit P15 report by PW10, during the course of investigation, PW11, who filed the final report under Section 173 Cr.P.C., has chosen to incorporate the house name and address of the first accused originally mentioned in the mahazar without any proper investigation regarding the identity of the accused. PW11 deposed that while working as Circle Inspector of Idukki during 2006-2007, the



investigation in this crime was almost complete and on receipt of the scene plan, he filed the final report after verifying the records. The statutory duty and obligation of the Investigating Police Officer is not merely to chargesheet the accused arrayed in the FIR at any cost, but to conduct detailed probe so as to unravel the truth of the matter, as held by this Court in ***Siraj K. and Another v. State of Kerala and Another*** [2022 KHC 240] .

19. In ***Om Prakash @ Baba v. State of Rajasthan*** [2009 KHC 5198], the Honourable Supreme Court held thus:

“7. A bare perusal of the evidence aforementioned would reveal that the ownership and possession of the house and the place of recovery is uncertain. As a matter of fact PW.3 has categorically stated that the house from where the recovery had been made belonged to one Durga Bhanji and not to the appellant. Even assuming for a moment that the house did belong to the appellant and was in his possession, the prosecution was further required to show the appellant had exclusive possession of the contraband as a very large number of persons including the appellant and five of his brothers, their children and their parents were living therein.”

20. The prosecution has not adduced satisfactory evidence in this case to prove the conscious possession of the contraband article by the appellant/first accused. In the absence of satisfactory evidence regarding the identity of the house and failure on the part of the



prosecution to establish the mandates necessary to ensure tamper proof collection of the sample and the unexplained delay in between the sending of the sample for chemical examination and the date on which the sample was received by the laboratory, the conviction and sentence imposed on the appellant/first accused for the offence under Section 8(1) r/w 8(2) of the Kerala Abkari Act is liable to be set aside.

21. The other allegation against the appellant/first accused is that when the police party attempted to arrest her, she had torn her nighty and made loud noise and on hearing the same, accused Nos. 2 to 4 reached there armed with weapons and attacked the police party. It is also alleged that when Police Constable, Jose Varghese, assisted Woman Police Constable to arrest the first accused, she beat him on his left cheek with hand.

22. A perusal of the evidence of PWs 1 to 5 would show that only PW4, Woman Police Constable Sreedevi, pointed out the accused, A1, in the dock as the person referred by her in the evidence and there is no proper dock identification of the appellant/first accused by PWs 1 to 3 and 5.



23. The identification of an accused in court by the witness is the substantive evidence and even if the witness and the accused are persons known to each other, it is obligatory for the witness to identify the accused in court by pointing out that the person referred to by him in the evidence is the person who is standing in the dock and it is obligatory for the court to record in the deposition that the witness had identified the accused in the dock, as held by this Court in **Vayalali Girishan and Others v. State of Kerala** [2016 KHC 204] and **Shaji @ Babu @ Japan Shaji v. State of Kerala** [2021 (5) KHC SN 27].

24. In this case, the presiding Judge has omitted to do so, while recording the deposition of PWs 1 to 3 and 5 and there was no attempt on the part of the prosecutor to put appropriate questions to the said witnesses for the said purpose. The trial court has not recorded in the deposition of PWs 1 to 3 and 5 that the said witnesses had identified the first accused, Vanaja, W/o. Raju, Thevarkkuzhiyil, Cheruthoni Kara, Idukki Village. In this connection, it is also pertinent to note that the address of the first accused in Exhibit P15 report filed by PW10 does not tally with the address of the accused in the final report filed under Section 173 Cr.P.C.



25. The evidence of PW12, doctor, and Exhibit P22, wound certificate of PW3, Jose Varghese, clearly shows that there is no external injury. Further, there is also nothing in Exhibit P22 to indicate that he sustained an injury on an attack by the appellant/first accused. It is pertinent to note that in Exhibit P22, the alleged history is shown only as 'raid'. Even though, PW3 deposed that the first accused, Vanaja, beat him on the left cheek at the time of occurrence, he has no case that he suffered any bodily pain and therefore, considering the nature of the medical evidence, it is not possible to arrive at a conclusion that the prosecution has proved the alleged overtact against the appellant/first accused.

26. Even though, the prosecution has a case that the first accused tore her nighty at the time of occurrence and made loud noise, no attempt is seen made to recover the torn nighty worn by the first accused at the time of the alleged occurrence. It is true that common intention can be inferred from the proved facts and circumstances and the same can develop during the course of an occurrence. But, Section 34 is only a rule of evidence which attracts the principle of joint criminal



liability and does not create any distinct substantive offence. Therefore, the question whether the prosecution has established common intention in a given case has to be decided on the basis of the proved facts. Since common intention implies acting in concert, the prosecution has to prove the existence of a prearranged plan, either from the conduct of the accused, or from the circumstances or from any incriminating facts and it is not enough to have the same intention independently of each other, as held by the Honourable Supreme Court in ***Chhota Ahirwar v. State of M.P.* [(2020) 4 SCC 126]**.

27. It is pertinent to note that even as per the prosecution case, accused Nos. 2 to 4 arrived at the spot on hearing the noise and the prosecution has no case that accused Nos. 2 to 4 reached there because of any premeditated or prearranged plan. It is well settled that Section 34 of the IPC is really intended to meet a case in which it is difficult to distinguish between the acts of individual members of a party and prove exactly what part was played by each of them. Even though there may be some evidence to show that accused Nos. 2 to 4 attacked the police party at the time of occurrence, the prosecution has miserably failed to



establish any common, premeditated or prearranged intention jointly of the appellant/first accused and the other accused persons to attack the police officers or to prevent them from discharging their official duty on the spot or otherwise. In the absence of satisfactory evidence to show that the appellant/first accused was in ownership or possession of the house in question or that she prevented the police officers from discharging their official duty, the conviction and sentence imposed by the trial court cannot be sustained.

28. In the result, the appeal is allowed. The conviction and sentence imposed by the trial court against the first accused/appellant is hereby set aside and she is acquitted of the offences punishable under Sections 353, 332, 506(ii) r/w 34 IPC and under Section 8(1) r/w 8(2) of the Kerala Abkari Act. The bail bond executed by the first accused/appellant shall stand cancelled and she is set at liberty forthwith.

sd/-
JOHNSON JOHN,
JUDGE.

Rv