

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 14TH DAY OF OCTOBER 2015/22ND ASWINA, 1937

CRL.A.No. 3 of 2006 (A)

AGAINST THE JUDGMENT IN SC 85/2005 of ADDL.SESIONS COURT
(ADHOC)-II, THODUPUZHA.

APPELLANT(S)/ACCUSED.:

MARY, W/O.JOSEPH, THUNDIYILE VEEDU,
CHELAMOODU BHAGAM, KOOTTOORKARA,
KARUNAPURAM VILLAGE,
IDUKKI DISTRICT.

BY ADVS. SRI.JOICE GEORGE
SRI.LIJJ.VADAKEDOM
SRI.RAJEEV JYOTHISH GEORGE

RESPONDENT(S)/COMPLAINANT.:

STATE OF KERALA,REP.BY THE P.PROSECUTOR
PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY ADV. PUBLIC PROSECUTOR SMT. S. HYMA.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
14-10-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 3 of 2006

Dated this the 14th day of October, 2016.

JUDGMENT

The accused was prosecuted for the offences punishable under Sections 55(a) and 8(2) of the Abkari Act. She was found guilty and therefore convicted and sentenced to undergo rigorous imprisonment for two years and to pay fine of Rs.1,00,000/–, in default, to undergo rigorous imprisonment for six months.

2. The incident in this case occurred on 9.1.2002. On that day, P.W.7, the Sub Inspector of Police attached to Kammbummettu police station along with P.W.5 had gone on abkari raid. At about 12.45 p.m., they got reliable information that the accused was keeping arrack in her house. They went to her house. As soon as they entered the courtyard of the house, the accused ran away. P.W.1 claims to have prepared search memo and sent to court. From the bed room on the

northern side of the building, two cans having the capacity of 35 litres and 10 litres were seized which contained some liquid. They were convinced that it was illicit liquor. Three samples were taken from the can having the capacity of 35 litres and they were sealed and labelled. They were numbered as S1, S2 and S3, The can was also sealed. Three samples were taken from the can having the capacity of 10 litres and they were also sealed and labelled and were numbered as S4, S5 and S6. Ext.P1 is the search list. They returned to the police station and P.W.7 registered crime as per Ext.P5 FIR. He conducted investigation also. He claims that Ext.P6 is the property list. He claims that he prepared the forwarding note and the articles were produced before court promptly for sending the samples for chemical examination and the report is Ext.P8. He obtained relevant records, questioned the witnesses, completed investigation and laid charge before court.

3. The court, before which final report was laid took cognizance of the offences. Finding that the offences are exclusively triable by a court of Sessions, the said court committed the case to Sessions Court, Thodupuzha. The said court made over the case to Additional District and Sessions Court (Adhoc) II, Thodupuzha for trial and disposal.

4. The latter court, on receipt of records and on appearance of the accused framed charge for the offences punishable under Sections 55(a) and 8(2) of the Abkari Act. To the charge, the accused pleaded not guilty and claimed to be tried. The prosecution therefore had P.Ws.1 to 7 examined and had Exts.P1 to P9 marked. M.Os. 1 to 3 were got identified and marked. After the close of the prosecution evidence, the accused was questioned under Section 313 Cr.P.C. She denied all the incriminating circumstances brought out in evidence against her and maintained that she

is innocent. Finding that she could not be acquitted under Section 232 Cr.P.C., she was asked to enter on her defence. She examined D.W.1 and had Ext. D1 marked.

5. The court below mainly based on the evidence of P.Ws.5 and 7 taken along with the contemporaneous document formed the opinion that the offence has been made out. Even though there is considerable delay in producing the materials before court, that was brushed aside on the ground that since police jeep was under repair, they could not produce the same before court. Accepting the evidence adduced by the prosecution, the court below found the accused guilty of the offence and conviction and sentence already mentioned followed.

6. Assailing the conviction and sentence, learned counsel for the appellant contended that there is nothing to show that the appellant was either the owner or in occupation or in possession of the property from where the contraband

article was seized and there is unusual delay in producing the materials before court. The reason given for the delay is totally unacceptable. If there is considerable delay in producing the articles before court and no explanation is offered, it is fatal to the prosecution case. For the above proposition, learned counsel relied on the decision reported in Ramankutty v. Excise Inspector, Chelannur Range (2013(3) KHC 308).

7. Learned Public Prosecutor contended that evidence of P.Ws.5 and 7 are consistent and cogent and that is sufficient to warrant a conviction. Though there was delay in producing the articles before court, the articles produced were sealed and labelled and that would show its authenticity. Relying on the evidence of P.Ws. 1 and 2, it was contended that these witnesses would say that the appellant was residing in the house. According to the learned Public Prosecutor, the trial court was perfectly justified in finding that the accused is

guilty of the charges levelled against him and there is no reason to interfere with the same.

8. After having heard learned counsel for the appellant and the learned Public Prosecutor, and perusing the records, this Court finds it difficult to uphold the conviction and sentence.

9. The prosecution case is spoken to by P.Ws. 5 and 7. They gave a consistent and uniform version of the incident. They say that they had got reliable information that illicit arrack was stored in the house of the accused. They say that they went to the place and seeing them the accused ran away. They searched the house and recovered two cans containing arrack. They say about sampling, labelling etc. P.W.7 speaks about having taken the articles and the accused to the office and registered crime. There is nothing to show that their evidence is unreliable. Apart from the above fact, there is the contemporaneous document, namely, the seizure mahazar. It

gives details about the incident. Therefore, there may be little doubt that there was such an incident as alleged by the prosecution.

10. The next question is whether there is anything to show that the accused was residing in the house in question. The documents produced by the defence would show that the building stands in the name of the mother of the accused. The appellant was residing in another house with her husband. She used to occasionally come to the above building. P.W.1 in chief examination did say that the accused stayed in the house. In cross examination, he stated that that was 4–5 years ago and at the time of the incident, the accused was staying elsewhere. There is nothing to show that the appellant was residing in any portion of the house from where the contraband article was seized. The prosecution was bound to establish that the appellant was in occupation of the building or that it is her property. It has got considerable

force in the case on hand, as contended by the learned counsel for the appellant. The prosecution ought to have shown that the accused was residing in a portion of the house.

11. The next question is the consequence of the delay in producing the articles seized before court. Here one may notice that the seizure was on 9.1.2002 and the articles reached the 20 days thereafter, i.e. on 29.1.2002. The reason given is that the police jeep was under repair.

12. That is not a justification for the delay especially when on the date of the incident, they had hired a vehicle to go for raid. It is seen that no satisfactory explanation has been offered by the prosecution for the delay. Consequence of not explaining the reason for the delay was considered in the decision reported in *Ramankutty v. Excise Inspector, Chelannur Range* (2013(3) KHC 308) wherein it was held that in the absence of satisfactory explanation, even a day's delay is fatal to the prosecution case. In the case on

hand, as rightly pointed out by the learned counsel for the appellant, the reason given for the delay in producing the article before court cannot be countenanced. If that be so, there is no guarantee that the articles produced before the court were the articles seized from the possession of the accused.

13. The accused had also adduced evidence to show that she was not residing in the house in question and the corroborative version is given by P.W.2 in cross examination. This fact has been omitted to be noticed by the court below.

For the above reason, this Court is unable to confirm the conviction and sentence passed by the court below. Hence, this appeal is allowed, the conviction and sentence passed by the trial court are set aside and it is held that the prosecution has not succeeded in proving the guilt of the accused beyond reasonable doubt. The accused is

acquitted of the charges levelled against her. Her bail bond shall stand cancelled and she is set at liberty.

P. BHAVADASAN,
JUDGE

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