

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 9TH DAY OF SEPTEMBER 2015/18TH BHADRA, 1937

CRL.A.No. 27 of 2006 (C)

AGAINST THE JUDGMENT IN SC 398/2004 of ADDITIONAL SESSIONS COURT,
FAST TRACK COURT-I, PALAKKAD.

APPELLANT(S)/ACCUSED:

VELAYUDHAN, S/O. AYYAPPAN,
KAKKUMKUNNATHU VEEDU, MELADESOM, PATTITHARA,
OTTAPPALAM.

BY ADVS.SRI.K.ABDUL JAWAD
SRI.U.MUHAMMED MUSTHAFA

RESPONDENT(S)/COMPLAINANT:

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

2. THE EXCISE INSPECTOR,
THRITHALA.

BY ADV. PUBLIC PROSECUTOR SMT. S. HYMA.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
09-09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 27 of 2006

Dated this the 9th day of September, 2015.

JUDGMENT

The accused was prosecuted for the offence punishable under Section 8 of the Kerala Abkari Act. He was found guilty and convicted and sentenced to undergo rigorous imprisonment for one year and to pay fine of Rs.1,00,000/-, in default, to undergo rigorous imprisonment for three months.

2. The prosecution case is that on 29.9.1998 at about 11.30 a.m. while P.Ws.1 and 2, the excise officers, were on patrol duty, they happened to see the accused with a can in his hand. The accused tried to escape and he was intercepted and the can containing two litres of arrack was seized. P.W.1 got sample from the same and prepared Ext.P1 mahazar. The accused was arrested as per Ext.P2 arrest memo. He along with the accused and articles returned to the office and registered crime as per Ext.P3. He produced the articles

before the court. Ext.P4 is the forwarding note. Chemical analysis report is marked as Ext.P5. P.W.4 conducted investigation, prepared scene mahazar, visited the place of occurrence and prepared sketch which is marked as Ext.P7 and laid charge before court.

3. JFCM Court, Pattambi took cognizance of the offence and finding that the offences are exclusively triable by a court of Sessions, the said court committed the case to Sessions Court, Palakkad. The said court made over the case to Additional Sessions Court, Fast Track-I, Palakkad for trial and disposal.

4. The latter court, on receipt of records and on appearance of the accused, framed charge for the offence punishable under Section 8 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 4 examined and had Exts.P1 to P7 marked. M.O.1 was identified and marked. After the close of the prosecution evidence, the accused was

questioned under Section 313 Cr.P.C. He denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent. Finding that the accused could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. He chose to adduce no evidence.

5. The court below found the evidence of P.Ws. 1 and 2 to be convincing enough and in the light of the contemporaneous documents came to the conclusion that there was nothing to show that there was any oblique motive on the part of the officers who had detected the article and seized the same. Finding that there is no suspicious circumstance, the court below found the accused guilty. Conviction and sentence as already mentioned followed.

6. Learned counsel appearing for the appellant assailing the conviction and sentence pointed out that practically no investigation was done at all and statements of witnesses had not been taken by P.W.4. All that he has done is

prepared the scene mahazar and that too after six years of the incident. The only independent witness, P.W.3, according to the learned counsel, turned hostile and he was not confronted with his statements before the Investigating Officer which would show that the Investigating officer has not even taken care to take statements of witnesses. It is also contended that there is disparity between Ext.P1 and Exts. P6 and P7 regarding the place of occurrence. Finally, it is contended that only one sample was taken by P.W.1 which is contrary to the provisions of the Act.

7. The evidence of P.Ws. 1 and 2 had been considered by the court below in considerable detail. Both of them say that on the date of the incident while they were on patrol duty they happened to see the accused with a can in his hand. They speak about having intercepted him and effected the seizure. Preparation of Ext.P1 is spoken to by P.W.1. P.W.1 speaks about having taken samples and then the registration of crime. There is nothing in the evidence of

P.Ws.1 and 2 to show that there is any contradiction in their evidence. Probably accepting their evidence, the court below found the accused guilty.

8. Though P.W.3, the independent witness, turned hostile, that may not be a ground to discard the prosecution case.

9. However, there is one glaring infirmity in the prosecution case. Section 53 of the Abkari Act mandates taking of samples of the contraband article seized by the Excise Officers. Clause 34 of the Excise Manual insisted that atleast two samples be taken by the officer concerned. The said provision has a purpose to serve, i.e., the court has to forward one sample to the laboratory for chemical analysis and on appearance of the accused, if he seeks to send the article to the laboratory, the court below is able to do so. In the case on hand, only one sample is taken and there is nothing in the mahazar and in the evidence of P.W.1 to show that the label on the sample contained the signature of independent witness.

Of course, P.W.1 in his evidence does say that the signature of the accused was obtained on the label on the sample. That is conspicuously absent in Ext.P1 which is the contemporaneous document.

10. In the light of the above fact, the conviction and sentence cannot stand.

This appeal is allowed, the conviction and sentence passed by the court below are set aside and it is held that the accused is not guilty of the charge levelled against him. If the fine amount is paid, the same shall be returned to the accused. His bail bond shall stand cancelled and he is set at liberty.

P. BHAVADASAN,
JUDGE

sb.