

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 25TH DAY OF NOVEMBER 2015/4TH AGRAHAYANA, 1937

CRL.A.No. 34 of 2006 (A)

**AGAINST THE JUDGMENT IN SC 69/2002 of ADDITIONAL SESSIONS COURT (ADHOC)-
II, KALPETTA DATED 20-12-2005**

APPELLANT(S)/ACCUSED.:

**PAUL KURIAKOSE, AGED 48 YEARS,
S/O.KURIAKOSE, CHULLOTHUKUZHIL VEEDU
ANCHALPETTY P.O. ONAKKOR VILLAGE
MUVATTUPPUZHA TALUK. ERNAKULAM DISTRICT.**

**BY ADVS.SRI.D.PEETHAMBARAN
SRI.MATHEW CHERIAN
SRI.M.R.SABU**

RESPONDENT(S)/COMPLAINANT AND STATE.:

- 1. THE EXCISE INSPECTOR,
SULTHAN BATHERY EXCISE RANGE, SULTHAN BATHERY.**
- 2. THE STATE OF KERALA, REPRESENTED
BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA
ERNAKULAM.**

BY PUBLIC PROSECUTOR SMT. S. HYMA

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 25-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 34 of 2006

Dated this the 25th day of November, 2015

J U D G M E N T

The accused was prosecuted for the offence punishable under Section 55(a) of the Abkari Act. He was found guilty. He was therefore convicted and sentenced to suffer rigorous imprisonment for five years and to pay a fine of ₹5 lakhs with a default clause of simple imprisonment for a further period of two years. Set off as per law was allowed.

2. The incident which gave rise to this prosecution occurred on 18.08.2000 at Muthanga Excise Check Post. While PWs 1 and 3 were at the check post along with other officers and they were checking the vehicles that were coming along, an Ambassador car bearing registration No. PY-01-J-409 was asked to stop near the check post. When the car was brought to a halt, the driver looked nervous. Feeling suspicious, the car was thoroughly examined. From below the seats, they could unearth some sort of a liquid in

the compartments made therein. On examination, they were convinced that it was spirit. Articles were seized in the presence of witnesses and the accused was arrested. PW1 took 200ml as sample in a bottle having a capacity of 375ml and sealed and labelled the same containing the signatures of the accused, witnesses and PW1. Further examination of the car and the body search of the accused did not yield anything. The mahazar prepared by PW1 is Ext.P1. The arrest memo prepared is Ext.P2. PW1 entrusted the custody of accused, documents and the contraband article seized to the Bathery Excise Range Office. The driving licence which was found in the car was also taken into custody. PW2, who was manning the Bathery Excise Range Office, took custody of the accused, articles delivered and the documents produced and as per Ext.P5, registered Crime No.11/2000. After preparing the occurrence mahazar, arrest memo, along with the arrest memo etc. the accused was produced before the court immediately. The vehicle seized was produced

before the Assistant Excise Commissioner. The entire contraband articles, after taking the sample, was produced before court. Ext.P6 is the property list produced before court. Ext.P7 is the forwarding note prepared by him and he obtained Ext.P8 report. As per the report, the liquid analyzed was spirit with 80.70 percent by volume of Ethyl Alcohol. The investigation in the crime was done by PW6. He prepared Ext.P10 scene mahazar and he took steps to have the contraband article seized destroyed as per Section 53A of the Abkari Act and took the necessary steps to have the balance contraband articles destroyed. After completing investigation, he laid charge before court.

3. The court before which the final report was laid, took cognizance of the offence and finding the offence to be exclusively triable by a Court of Sessions, committed the case to Sessions Court, Kalpetta under Section 209 of Cr.P.C. after following the necessary procedures. The said court made over the case to Additional Sessions Court, (Adhoc-II),

Kalpetta, for trial and disposal.

4. The latter court, on receipt of records and appearance of the accused before the said court, framed charge for the offence punishable under Section 55(a) of the Abkari Act.

5. To the charge the accused pleaded not guilty and claimed to be tried. The prosecution examined PWs 1 to 6 and had Exts.P1 to P10 marked. M.O.1 was got identified and marked.

6. After the close of 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. In the statement filed by him, he claimed to be a native of Muvattupuzha and he was a vendor in Pineapple. On 16.08.2000, he was on his way from Vazhakkulam market to Mysore with the load of Pineapple. He had waited there till night to get the money for the commodity. As he was not

able to receive the money and as he had to return home immediately, he boarded the lorry which was coming to Thrissur. At the Muthanga Check Post, the lorry was stopped and the accused claimed that he got down from the lorry and was waiting on the road. He found that the Excise Officers were inspecting a vehicle and due to enthusiasm and anxiety, he came to the place. He claimed that one of the Excise Officers asked him what was his business to be there and when he replied that he was not concerned and he tried to walk away, the Excise Officer sought for his name and address. He was thereafter falsely implicated as if the car belonged to him.

7. Finding that the accused could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. He examined himself as DW2 and examined DW1 in his defence.

8. On appreciation of the evidence in the case, the court below found that the evidence of PWs 1, 3, 4 and 5 left

one in no doubt that the accused was the driver of the vehicle and that 450 litres of spirit was seized from the vehicle which he had driven on the day of incident. The court below found that his story of travelling in a lorry etc. are false and without any basis and on finding him guilty, conviction and sentence followed.

9. The learned counsel appearing for the appellant assailing the conviction contended that the number of the vehicle shown in the forwarding note and the number of the vehicle shown in the Chemical Analysis Report vary and that creates a serious doubt regarding the sample analyzed in the laboratory. It becomes extremely doubtful whether the sample analyzed in the laboratory is the sample taken from the contraband article said to have been possessed by the accused in his vehicle. It was then pointed out that there was one day's delay in producing the articles before court and that is not properly explained. Further, it was contended that even according to the prosecution, the spirit

was loaded in several compartments in the car and only one sample has been taken and that is insufficient. Finally, it is contended that even according to PW1, the sample was taken with the aid of a tube and that tube had not been produced before court. These are the significant matters which go to the root of the issue and these infirmities make the conviction illegal.

10. The learned Public Prosecutor on the other hand contended that none of the above factors have a bearing on the issue involved in the case. The evidence of PWs 1, 3, 4 and 5 are clinching enough to show that it was the accused who had driven the vehicle on the day of incident and that the said vehicle did carry 450 litres of spirit. The slight error in the number shown in the Chemical Analysis Report is of no consequence for the simple reason that it makes mention of the fact that the sample seals tallied and also that the crime number is also shown, which is the crime number involved in this case. Therefore, that can be treated only as

a clerical error, which does not cause any prejudice to the accused. PW2 has given reasons as to why he could not produce the article on the same day and he has given reasonable explanation for producing the contraband article on the next day. There is no reason to doubt his version so that the delay is properly explained. Otherwise also, the learned Public Prosecutor relied on a Division Bench decision of this Court which says the word 'forthwith' does not mean immediately, it only means within a reasonable time and in case there is some delay, it has to be properly explained. The learned Public Prosecutor pointed out that the grievance voiced regarding the taking of sample only from one compartment has no basis for the simple reason that as far as the possession of the spirit is concerned, the finding does not depend upon the quantity and moreover, it has been stated that the liquid found in all the compartments were identical, in which case, it is well settled by now that sample taken from one bottle from one of the compartments is

sufficient. The grievance that the tube by which the sample was collected is not produced, according to the learned Public Prosecutor, is ridiculous. There is no obligation or there is no duty cast on the person who takes the samples to produce that utensil by which the sample is taken. In short, the learned Public Prosecutor contended the court below has analyzed the evidence meticulously and has found the evidence to be convincing enough to hold the accused guilty. There is no reason to interfere with the finding of the court below.

11. Even though the accused came forward with a story of travelling in a lorry etc. and accidentally going to the place of incident, that remains unsubstantiated. The evidence of detection is spoken to by PWs 1, 2, 3 and 5, among whom PWs 1 and 2 are the Excise Officers. PW1 is the person who had the vehicle stopped and who had examined the vehicle. He had discovered the hidden compartments in the car containing the contraband article.

He then speaks about having made it known to the accused that he had committed a crime and says that he prepared the arrest memo and had the accused arrested. He also speaks about the sample taken and he speaks about having prepared Ext.P1 mahazar also. He then says that he had the articles, accused and the documents produced before the Range Office. In his evidence regarding the detection of the offence, he gets sufficient support from the evidence of PW3, who was the member of the Special Squad attached to Preventive Office. He gives the identical version as the one given by PW1 and speaks meticulously of the each act done by PW1 regarding the seizure, preparation of documents etc.. Even though PWs 1 and 3 were cross examined at length regarding various aspects, nothing could be brought out which shows that they had any reason to falsely implicate the accused. The suggestion to these witnesses that when the car was brought to a halt at the behest of PW1, the actual occupants took to their heels and the

accused was falsely implicated.

12. The evidence of PW5 assumes importance in this connection. He, at the relevant time, was working as the Sales Tax Inspector. He was on duty at Muthanga Check Post. An Ambassador car was brought to a halt near the check post and the Excise Officers were seen going near the vehicle. Inquisitiveness took him to the place. He found that the Excise Officers had discovered compartments or tanks below the seats and also found that those compartments contained liquid. The Excise Officers identified the liquid as spirit. He also speaks about the Excise Officer having taken sample and he identified the accused as a person who had driven the vehicle. He identified his signature on Ext.P1.

13. It is true that one of the independent witnesses did turn hostile. But the evidence of PWs 1, 3 and 5 unerringly pointed out that it was the accused who had driven the vehicle which was brought to a halt at the check post from

which the contraband article was seized.

14. Regarding the seizure of the contraband article, sufficient support is available from Ext.P1 mahazar, a contemporaneous document prepared by PW1 and produced before the court on the same day itself along with the occurrence report. The chances of manipulation and fabrication are far too remote. It is significant to notice that the accused was also produced on the same day.

15. There is nothing to indicate nor is there anything suggested either to PW1 or PW3 that they had any reason to falsely implicate the accused. His story of having travelled in a lorry and having gone near the vehicle to find out what was happening, can be only taken with a pinch of salt. As rightly noticed by the court below, the evidence of DW1 can be of now help to him.

16. Coming now to the points raised by the learned counsel for the appellant, the first is regarding the difference in the number of the car in the forwarding note and in the

Chemical Analysis Report. True, there is a slight difference. But as rightly pointed out by the learned Public Prosecutor, the crime number is shown in the Chemical Analysis Report and so also it is stated that the sample seal forwarded tallied with the seal found on the sample bottle sent for analysis. The number shown in the Chemical Analysis Report can only be a clerical error.

17. PW2, the person before whom the articles, documents and the accused were produced, has deposed before court that he prepared the occurrence report, the property list and had produced the accused and documents before the court though the contraband article was produced only on the next day. Even assuming that the articles were produced only on the next day, there is nothing to show that any prejudice has been caused or any tampering could have been done in the meanwhile.

18. As regards the contention regarding the taking of sample only from one of the compartments too is without

any basis or whatsoever. PWs 1 and 3 have uniformly stated that the contents of all the compartments found in the car were identical and they did not feel that each of the compartments contain different liquids. In such circumstances, it is by now well settled that it is sufficient if the sample is taken from one of the bottles or one of the compartments as the case may be. This contention therefore too should fail.

19. Now coming to the last contention regarding the non-production of the tube used for taking sample. As rightly pointed out by the learned Public Prosecutor, it is to be ignored as unworthy of discussion.

20. The court below has considered the matter in considerable detail and has placed reliance on the evidence of PWs 1, 3, 4 and 5 and has found that the defence set up is totally false. On an independent analysis of the evidence in the case, this Court too finds that the finding of the court below to be fully justified. The story of the accused

travelling in a lorry etc., are nothing, but a cock-and-bull story.

21. The court below was therefore perfectly justified in finding the accused guilty. His conviction has only to stand.

22. Faced with the above situation, the learned counsel appearing for the appellant pointed out that the sentence imposed is too severe and is disproportionate to the offence alleged to have been committed by the accused. He has highlighted the difficulties and problems of the accused while answering to the question put by the court whether if he had anything to say regarding the sentence. The complaint is that the lower court was carried away by the quantity and has not considered the position of the accused in the process. The antecedents and nature of the offence are relevant factors as regards sentencing policy is concerned. There is no antecedents or history of the accused having been involved in such transportation or carrying of contraband articles and nor after going on bail,

he has done it again. Under these circumstances, the learned counsel for the appellant pointed out that some leniency may be shown with regard to the sentence.

23. It has to be said that there is some substance in the above contention. True, the crime is heinous and the consequences are drastic. Spirit flows and flows in Kerala. That has necessarily to be curbed. But in the process, the court shall not be carried away in the matter of sentencing an accused when situation warrants a lenient consideration. Since there is no antecedents shown as regards the accused and since it is felt that probably a proportionate term of imprisonment may reform him, it is felt that under the circumstances, some leniency can be shown in the matter of sentence.

Therefore, while confirming the conviction of the accused for the offence punishable under Section 55(a), the sentence awarded is set aside and the accused is sentenced to undergo rigorous imprisonment for a period of three years

and to pay a fine of ₹1 lakh with a default clause of six months. set off as per law will be allowed.

Sd/-
P.BHAVADASAN
JUDGE

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P.A. to Judge