

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 8TH DAY OF SEPTEMBER 2015/17TH BHADRA, 1937

CRL.A.No. 36 of 2006 (A)

AGAINST THE JUDGMENT IN SC 501/2004 of ADDITIONAL DISTRICT &
SESSIONS (ADHOC) COURT-I, PATHANAMTHITTA.

AGAINST THE ORDER/JUDGMENT IN CP 171/2003 of J.M.F.C., ADOOR.

APPELLANT(S)/ACCUSED:

CHANDRIKA, D/O. JANAMMA,
SUDHEER BHAVANAM, ELAMANNOOR MURI,
ADOOR TALUK.

BY ADV. SRI.SAJJU.S

RESPONDENT(S)/COMPLAINANT:

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

BY ADV. PUBLIC PROSECUTOR SMT. S. HYMA.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
08-09-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 36 of 2006

Dated this the 8th day of September, 2015.

JUDGMENT

The accused was prosecuted for the offences punishable under Sections 8(1) and 8(2) of the Abkari Act. She was found guilty and therefore convicted and sentenced to undergo simple imprisonment for a period of six months and to pay fine of Rs.1,00,000/- with a default sentence of two years. Set off as per law was allowed.

2. The prosecution case in brief is that on 11.8.1999 while P.W.1 along with P.W.2 and other officers were on patrol duty, they happened to come across a lady walking along the road coming from the opposite direction carrying a can. Seeing the Excise officers, she got perplexed and attempted to get away. She was intercepted and the can was seized. The can was of 5 litre capacity and it was full of liquid. On examination, it was found to be arrack. She was

arrested at the spot and prepared Ext.P1 arrest memo which contains the signature of P.Ws.1 and 3. P.W.1 claims to have taken sample of the liquid from the spot itself and labelled the same in accordance with law. The rest of the quantity was also seized and that was produced before the court as M.O.1. Ext.P2 mahazar was prepared. The article so seized from the accused were entrusted with P.W.4, Assistant Excise Inspector in charge of Adoor Excise Range Office. He prepared Ext.P4 FIR and thereafter the investigation was taken over by P.W.5. It must be noticed that Ext.P1 arrest memo and Ext.P2 mahazar were prepared and proved through P.W.1. Investigation was taken over by P.W.5, who recorded statements of witnesses and questioned P.W.3. He was succeeded by P.W.6 another Excise Officer who verified the records and filed final report. Ext.P5 is the thondi list.

3. Cognizance of the offence was taken by JFCM Court, Adoor. The court found that the offences are

exclusively triable by a court of Sessions and therefore committed the case to Sessions Court, Pathanamthitta. The said court made over the case to Additional District and Sessions Court (Adhoc) I, Pathanamthitta 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 8(1) 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 6 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. 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 chose to adduce no

evidence.

5. The trial court relying on the evidence of P.Ws.1 and 2 found that the incident had been proved. It was brought to the notice of the trial court that Ext.P7 chemical analysis report shows that the sample had reached the laboratory on 22.6.2002 along with letter dated 20.4.2002. One contention taken was that there was delay of two months and the same remained unexplained and that was fatal to the prosecution. What the learned Judge appears to have done was that he addressed the court below on this issue and got a letter and after verifying the records, it was found that the article was forwarded only on 22.6.2002. Relying on that letter and without even giving an opportunity to the accused to look into those documents to challenge the veracity of the statement so made, the court below came to the conclusion that the offence is established as per the documents on evidence. Finding the accused guilty, conviction and

sentence as already mentioned followed. The said conviction and sentence are assailed in this appeal.

6. Two points were raised by the learned counsel for the appellant in this appeal. First of which is that as per the provisions, two samples had to be taken. The purpose behind the same is one to be retained in court and the other to be sent for chemical analysis. Later, if the accused so wants, the second sample has to be sent for chemical analysis. It is mandatory that two samples should be taken. In the case on hand, only one sample had been taken and that caused prejudice to the accused. Secondly, it is contended that what the court below did was unfair and unjust. If the court has got down records from the lower court regarding the sending of articles for chemical analysis, in all fairness, it should have been put to the accused. Further, the act of the court in getting a letter from the court below and reaching a conclusion regarding the absence of details was not put to the

accused when she was questioned under Section 313 of Cr.P.C. It must be noticed that these items of evidence are necessary to come to the conclusion that the accused had committed the offence. So the communication so got is an important piece of evidence. Finally, it is contended by the learned counsel for the appellant that for the above reasons it is not possible to uphold the conviction as both the acts cause serious prejudice to the accused and that vitiates the conviction.

7. Learned Public Prosecutor pointed out that the court has ample power to call for any document from any court and verify the same and the fact that the court had done so cannot prejudice the accused. Learned Public Prosecutor however had no answer to the contention taken by the learned counsel for the appellant that only one sample had been taken. The prosecution relies on the evidence of P.Ws.1 and 2 to prove the incident. The lower court has elaborately

discussed the evidence in great detail. After going through the evidence of P.Ws. 1 and 2, it is found that there is no material contradiction in their evidence. There is no lacuna in the sampling itself. Thus there is no doubt that the article was seized from the possession of the accused.

8. P.W.3 is an independent witness who turned hostile. His statement was taken by the investigating officer. He denied having given any statement to the investigating officer also. It is surprising to note that the Public Prosecutor got the entire statement marked instead of putting only those portions which amounted to contradiction. Whatever that be, this has no relevance in the present case. P.Ws.4, 5 and 6 are investigating officers whose evidence has no relevance in the case on hand.

9. Regarding the contentions raised by the learned counsel for the appellant, there seems to have considerable force. It is absolutely necessary that the Investigating Officer

should prepare two samples when he seized the material. That is necessitated for a purpose and object. The object is that on appearance of the accused, if he so desires, he can seek the second sample to be sent for chemical analysis to prove his case. In the case on hand, only one sample has been taken and the accused had lost the opportunity to have it sent for chemical analysis. In this case, there is no second sample. Therefore, it cannot be said that no prejudice has been caused to the accused. Learned counsel for the appellant is justified in his submission that prejudice has been caused to the accused because only one sample had been taken.

10. Equally formidable is the second contention taken by the appellant. One of the specific contentions raised before the trial court was that even though T.R. Was dated 20.4.2002, the article seized had reached the laboratory only on 22.6.2002. There is a gap of two months. There was a contention raised by the learned counsel that there is no

explanation offered with regard to the unusual delay and in the absence of any explanation, it is extremely doubtful whether the sample which reached the laboratory is the sample which is alleged to have been taken by P.W.1.

11. What the lower court did was it addressed the lower court regarding the same and got a letter from there and found that the sample was forwarded only on 22.6.2002 and everything is in tact and there is no prejudice caused to the accused.

12. Even assuming that the act of non-taking of two samples could be kept aside, the act of the court below in calling for the documents is relevant as far as the accused is concerned especially when the court below has taken those items of evidence as against the accused. It is well settled that any item of evidence which is used against the accused should be put to him when questioned under Section 313 Cr.P.C. Admittedly the facts which the court found on calling for

records have not been put to the accused when questioned under Section 313 Cr.P.C. and therefore those items of evidence could not have been relied on by the court below.

For the above reasons, this Court is unable to uphold the conviction and sentence passed by the court below. The conviction and sentence passed by the court below are set aside and the accused shall stand acquitted of the charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

P. BHAVADASAN,
JUDGE

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