

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 28TH DAY OF SEPTEMBER 2015/6TH ASWINA, 1937

CRL.A.No. 60 of 2006 (C)

**AGAINST THE JUDGMENT IN SC 200/2003 of ADDITIONAL SESSIONS COURT
(ADHOC-III), KASARAGOD, DATED 30-12-2005**

APPELLANT(S)/ACCUSED::

**KANNAN, S/O. THER, AGED 63 YEARS,
RESIDING AT CHULLIYODI COLONEY, KALLAR VILLAGE.**

BY ADV. SRI.T.K.VIPINDAS

RESPONDENT(S)/COMPLAINANT::

**STATE OF KERALA, REPRESENTED
BY REPRESENTED BY PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.
REPRESENTING THE EXCISE INSPECTOR
HOSDURG EXCISE RANGE.**

BY ADV. PUBLIC PROSECUTOR SRI. C.K. JAYAKUMAR

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 28-09-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 60 of 2006

Dated this the 28th day of September, 2015

J U D G M E N T

The accused in this case was prosecuted for the offence punishable under Section 55(g) of the Abkari Act. He was found guilty. Therefore, he was convicted and sentenced to suffer simple imprisonment for a period of one year and to pay a fine of ₹ 1 lakh with a default clause of simple imprisonment for a period of six months.

2. The prosecution allegation is that on 20.09.1999, at about 4.00 p.m., while PW1 along with his team of officers were on usual patrol duty, when they reached near the house of one Avarachan, the accused was seen coming along the road carrying a plastic pot around his shoulder. Seeing the excise officials, he became nervous. Feeling suspicious, the pot was examined. It revealed that it was wash used for illicit distillation of arrack. Informing about the illegality of carrying such articles, he was arrested as per

Ext.P1 arrest memo. MO1 is the pot seized from the accused. PW1 then prepared samples and affixed the seal on the same. He also secured the balance quantity and on both the samples as well as the balance quantity, he had labels containing his signature as well as the signature of the accused, independent witnesses affixed. The accused was produced before the Special Circle Inspector. Unfortunately, since the officer, who had received articles and accused as forwarded by PW1, is no more and PW7 was examined to prove the documents prepared by the said officer. He identified the signature of the earlier officer on Ext.P6 forwarding note. Ext.P7 is the chemical analysis report. He had recorded the statements of witnesses, completed investigation and laid charge before court.

3. The court before which the final report was laid, took cognizance of the offence, but finding the offence to be exclusively triable by a Court of Sessions, committed the case to Sessions Court, Kasargod. The said court made over

the case to Additional Sessions Court, Adhoc-III, Kasaragod for trial and disposal. The latter court on receipt of records and on appearance of the accused before it, framed charges for the offence punishable under Section 55(g) of the Abkari Act.

4. To the charge, the accused pleaded not guilty and claimed to be tried. The prosecution therefore had PWs 1 to 8 examined and had Exts.P1 to P8 marked. MO 1 was got identified and marked.

5. 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.

6. Finding that he could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. He chose to adduce no evidence.

7. The court below, mainly relying on the evidence of PWs 1 and 2 and contemporaneous document Ext.P2, found

the accused guilty and conviction and sentence as already mentioned are followed.

8. Assailing the said conviction and sentence, the learned counsel appearing for the appellant pointed out that no seizure mahazar is prepared at the spot and there is want of material to show that there was actual seizure as claimed by PW1 in his evidence. It was further contended that the pot which is alleged to have been carried by the accused was green in colour, but the pot which was produced before court was black in colour. There is perceivable change in the nature of article seized and produced before court. This goes to the advantage of the accused since it is clear that the article produced before court is not the article seized at the time of detection of crime. It was further contended that the article and the accused were produced before court on 22.09.1999, but the sample was sent for chemical analysis only on 02.03.2000. That is after the lapse of nearly five months. It is also pointed out that PWs 1 and 2 do not speak

about affixture of seal either on the samples or on the balance quantity of wash which they claimed to have seized from the possession of the accused. These factual infirmities which have a considerable bearing on the issue involved in this proceedings have been conveniently omitted to be noticed by the court below and a wrong order of conviction and sentence has been passed.

9. The learned Public Prosecutor on the other hand contended that there is nothing to interfere with the order of conviction and sentence passed by the court below. PWs 1 and 2 give evidence regarding the incident and that is supported by Ext.P2, the mahazar prepared at the same time by PW1. There is no suggestion to PWs 1 and 2 that they had any axe to grind against the accused and therefore false implication can necessarily be ruled out.

10. The lower court has considered all the aspects in all angles and has found that the accused is guilty. This Court, in appeal, even if a different view is possible, may not

interfere with the finding of the court below.

11. The evidence mainly consists of the testimony of PWs 1 and 2. As already stated, PWs 1 and 2 were on routine patrol duty and they happened to see the accused coming along the road carrying a plastic pot around his shoulder. He was intercepted and on examination of the contents, it turned out to be wash used for distillation of illicit arrack. The accused was arrested and article was seized. PW1 says that he prepared samples from the articles seized from the accused and had them sealed and labelled. He affixed his personal seal 'RR' on the same. In no less terms he would say that on samples as well as on the balance quantity which were seized, labels contained the signature of himself, the witnesses and the accused were affixed.

12. The evidence of PW1 gets considerable support from the evidence of PW2 who was accompanying PW1 at the time of patrol duty. He also gives almost same version.

Therefore, it is unnecessary to refer his evidence independently. It is no doubt true that the two independent witnesses namely PWs 3 and 4 turned hostile to the prosecution as is in the usual case. But PW3 admitted his signature at another place on the mahazar claimed it to have been affixed. He denied having seen the actual seizure of article from the accused. PW4 has also no case that the Police Officials have an axe to grind against the accused. Both PWs 3 and 4, though would admit their signature on the relevant documents, would say that their signatures were affixed elsewhere.

13. The learned counsel appearing for the appellant may not be quiet justified in his submission that no seizure mahazar is prepared. Ext.P2 is the mahazar which shows what had happened at the spot and what had been done by PW1 after detection of the crime. It gives a detail narration of the incident that transpired on the particular date. Ext.P2 also makes mention of the fact that the samples as well as

the balance quantity left were sealed and labels contained the signature of the accused, witnesses and the officer concerned were affixed. There is no suggestion to PWs 1 and 2 that the statements contained in Ext.P2 is not correct. Ext.P2 being a contemporaneous document is entitled to considerable weight.

14. As regards the change of colour of the MO1 produced before court, there is not much substance. The offence was in the year 1999 and PW1 was examined on 01.12.2005. That is, after six years of the incident. It is possible that the pot which might have undergone natural changes and might have acquired a black colour though it might have been initially green. So long as the accused had no case that the Police Officers had any grudge against him, the change of colour as such cannot be taken as a ground to come to the conclusion that the articles produced before court is not the articles seized.

15. As regards the delay in sending the samples for chemical analysis, those articles are produced before court on 22.02.1999, but it was sent for chemical examination on 01.03.2000. There is nothing to show that the delay has prejudiced the accused in any manner. If the claim of the accused was that during the period, the articles seized could have undergone chemical transformation, it is for him to establish the said fact. It is not suggested to PWs 1 and 2, who were the detecting officer and the accompanying officer that there was a deliberate attempt to delay the sending of samples to court and also to the chemical analysis laboratory. Ext.P7 is the chemical analysis report. It shows that the seals were found intact.

16. It is not the law that the evidence of excise officials or the Police officer as the case may be should receive necessary corroboration from the independent witnesses. They may or may not support the prosecution. However, in this case, the independent witnesses admit their

signature on Ext.P2 mahazar though they say they signed at different places.

17. There is nothing to doubt the testimony of PWs 1 and 2 who it is not shown to have any axe to grind against the accused or any ill will towards him. Of course, there are certain minor inconsistencies in their evidence. But that is natural when the witnesses are examined after a long time after the incident was detected. None of the contentions raised by the learned counsel for the appellant is sufficient to doubt the conclusion arrived by the court below. The court below has analysed the evidence in considerable detail and has come to the conclusion that the prosecution has succeeded in establishing the case against the accused. There is no reason to take a different view.

18. Faced with the above situation, the learned counsel for the appellant contended that the sentence imposed is on the harsh side and some leniency may be shown.

19. There is nothing to show that the accused had indulged in any such activities earlier or that he is a habitual offender. While confirming the conviction of the accused under Section 55(g) of the Abkari Act, the sentence awarded is set aside and instead, he is sentenced to undergo simple imprisonment for a period of three months and to pay a fine of ₹ 1 lakh, in default of payment of which he is to suffer simple imprisonment for a period of two months. Set off as per law will be allowed.

With the above modification, this appeal is dismissed.

Sd/-
P.BHAVADASAN
JUDGE

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P.A. to Judge