

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 4TH DAY OF DECEMBER 2015/13TH AGRAHAYANA, 1937

CRL.A.No. 104 of 2006 ()

AGAINST THE JUDGMENT IN SC 37/2002 of ADDITIONAL DISTRICT &
SESSIONS COURT (ADHOC)-II, KOLLAM.

APPELLANT(S)/ACCUSED:

REMANAN, S/O. PAPPAN,
PARANKIMAMTHARA VEEDU, THAZHEM MURI,
EAST KALLADA VILLAGE.

BY ADV. SRI.K.S.MANU (PUNUKKONNOOR)

RESPONDENT(S)/COMPLAINANT:

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

BY PUBLIC PROSECUTORSMT. LILLY LESLIE.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
04-12-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 104 of 2006

Dated this the 4th day of December, 2015.

JUDGMENT

The accused was prosecuted for the offences punishable under Sections 55(a) and (i) of the Abkari Act. He was found guilty, but he was convicted for the offence punishable under Section 8(1) of the Abkari Act 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 one year.

2. The incident in this case occurred on 9.1.2000. P.W.6, the Sub Inspector of Police attached to East Kallada Police Station along with P.Ws.3 and 4 had gone on routine patrol duty as usual. When they reached Elavoor, they happened to get information about sale of arrack by the accused in his house. They reached the spot and found the accused holding a can in his left hand and a glass in his right

hand. He was intercepted and the can was seized which had a capacity of 10 litres and it contained 6 litres of liquid. By taste and smell, it was identified as arrack. The accused was arrested at the spot and 200 ml in a bottle having capacity of 375 ml was taken as sample and the sample and the can were sealed and labelled. The label contained the signature of the accused, independent witnesses and P.W.6. Ext.P1 is the mahazar prepared at the spot. He returned to the station along with the articles, the accused and the documents and registered Crime No.8 of 2000 as per Ext.P2 FIR. Properties were produced before court and the forwarding note was preferred by him. Chemical analysis report obtained by him is Ext.P4.

3. P.W.5 claims to have conducted investigation in this case and submitted the final report.

4. 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, Kollam under Section 209 Cr.P.C. The said court made over the case to Additional District and Sessions Court (Adhoc) II, Kollam for trial and disposal.

5. The latter court, on receipt of records and on appearance of the accused framed charge for the offence punishable under Section 8(1) 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 P4 marked. After the close of the prosecution evidence, the accused was questioned under Section 313 Cr.P.C., wherein 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.

6. Convinced and influenced by the evidence furnished by P.Ws. 6, 3 and 4 about the detection, seizure and also by Ext.P1 contemporaneous document, the court below found that the offence has been established and accordingly convicted and sentenced as already mentioned.

7. Learned counsel appearing for the accused assailed the conviction on three main grounds. They are (1) there is a delay of six days in producing the properties before court, (2) the forwarding note has not been produced and marked in this case and (3) it is the Assistant Sub Inspector of Police who had conducted the investigation and laid the final charge. Elaborating on these aspects, it is contended by the learned counsel that there is six days delay in producing the articles before court and there is no explanation offered. By relying on the decision reported in *Ramankutty v. Excise Inspector, Chelannur Range* (2013 (3) KHC 308), it was contended that unexplained delay is fatal to the prosecution

case.

8. Relying on the decision reported in Joseph v State of Kerala (2009(4) KHC 537) it is contended that non-marking of forwarding note is fatal to the prosecution since the forwarding note ought to contain the specimen seal which is the only guarantee for the court to ensure that the sample sent for chemical examination is the sample taken from the contraband seized from the possession of the accused. And finally it is contended that at the relevant time, Assistant Sub Inspector was not an Abkari Officer as defined under the Act and he is incompetent to conduct any investigation let alone filing the final report. In support of the said contention, learned counsel relied on the decision reported in Unni v. State of Kerala (2009(2) KHC 661).

9. Accordingly, it is contended that conviction and sentence cannot stand.

10. Learned Public Prosecutor on the other hand tried to support the finding of the court below based on the evidence of P.Ws. 6, 3 and 4. According to the learned Public Prosecutor, the court below has chosen to accept their evidence and this Court cannot take a different view unless there are compelling circumstances. On facts, it is contended that no interference is called for.

11. After having heard learned counsel on both sides, it is extremely difficult to accept the contention of the learned Public Prosecutor. Of course, it is true that P.Ws. 6, 3 and 4 gave a uniform version regarding the incident. All of them say about the detection, seizure of the contraband article, arrest of the accused, taking of sample and about sealing and labelling. All the three of them say about having prepared Ext.P1 mahazar at the spot itself.

12. If the above materials are sufficient in law, then certainly the prosecution case is strong enough. But

unfortunately for the prosecution, the delay of six days as pointed out by the learned counsel for the appellant remains unexplained. The articles might have been in the custody of the police, but they did not gave any reason for the delay in producing the articles. In the decision reported in *Ramankutty v. Excise Inspector, Chelannur Range* (2013 (3) KHC 308) it was held that even a day's delay is fatal unless satisfactory explanation is given.

13. Coming to the non-production of the forwarding note, it was held that production of forwarding note is absolutely necessary so as to enable the court to ascertain the specimen of the seal said to have been affixed on the label and to ensure that the sample which reached the laboratory is the sample taken from the contraband seized from the possession of the accused. In the case on hand, for reasons best known to the prosecution, the forwarding note has not been produced and finally investigation in the case

had been made and final report was laid by Assistant Sub Inspector of Police. In the decision reported in Unni v. State of Kerala (2009(2) KHC 661), it was held that as per Section 4 of the Abkari Act, the Government had authorised only certain officers of the State to detect or investigate the offences contemplated under the Abkari Act. The Assistant Sub Inspector of Police as per the notification issued by the Government is not authorised nor empowered to detect or investigate the abkari offences.

14. It is therefore clear that as per the notification then in force, the Assistant Sub Inspector had no authority either to detect or to conduct investigation, and that is done in the present case. Investigation conducted by an incompetent officer is non-est in law. If that be so, it is difficult to accept the finding of the court below.

15. In the light of the glaring infirmities pointed out by the learned counsel for the appellant, for which no

reasonable explanation is given by the prosecution, it is felt that the prosecution has failed to establish the charges levelled against the accused.

For the above reasons, 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 him. His bail bond shall stand cancelled and he is set at liberty.

P. BHAVADASAN,
JUDGE

sb.