

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 19TH DAY OF NOVEMBER 2015/28TH KARTHIKA, 1937

CRL.A.No.113 of 2006

AGAINST THE JUDGMENT IN SC 190/2004 of ADDITIONAL SESSIONS COURT
FAST TRACK COURT NO.1 (ADHOC), MANJERI DATED 23-12-2005

APPELLANT/ACCUSED:

RAMANKUTTY, S/O.CHENNAKKOTTIL,
THEYYU, KURUMPELANGODE AMSOM, DESOM,
RESIDING AT NEELANHI, NILAMBUR TALUK.

BY ADV. SRI.K.P.MUJEEB.

RESPONDENTS:

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

BY SMT. MADHUBEN, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
19-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.113 OF 2006

Dated this the 19th day of November, 2015.

J U D G M E N T

The accused in this case was prosecuted for the offence punishable under Section 8(1) of Abkari Act. He was found guilty and was therefore convicted and sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs.1 lakh with default clause of simple imprisonment for one year. Set off as per law is allowed.

2. The incident in this case is alleged to have taken place on 11.06.2002. PW1 was functioning as Preventive Officer in Nilambur Excise Office at that point of time. On that day, he along with other officers went for patrol duty and by about 1.30 pm, they found the accused coming along the road carrying a yellow plastic sack. As soon he saw the Excise Officials, he tried to escape. Feeling suspicious, he was intercepted and the sack in his possession was seized. On examination of the sack, it

was seen to contain a can having a capacity of 5 liters. Opening the can, it was found to be full of some kind of liquid. By taste and smell, it was identified as arrack. After preparing Ext.P1 arrest memo, accused was arrested. PW1 took sample of 180ml from the can and sealed and labeled the same so also the balance contraband article. Ext.P2 is the mahazar prepared at the spot. Labels were affixed both on sample and the balance article containing the signatures of accused, witnesses and PW1. Ext.P3 is the arrest notice prepared him. He then returned to the station.

3. PW5 was the Excise Inspector at the relevant time. He accepted the documents and contraband produced and took custody of accused handed over to him by PW1. He registered crime as per Ext.P4 occurrence report and prepared Ext.P5 property list and Ext.P6 forwarding note. He had the accused, documents and articles produced before court.

4. PW6 conducted investigation of the case. He recorded the statement of witnesses, obtained chemical analysis report Ext.P7 and laid final report.

5. The court before which final report was laid took cognizance of the offence and finding that the offence is exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Manjeri. The said court made over the case to Additional Sessions Court Fast Track-1 (Adhoc), Manjeri for trial and disposal. The latter court, on receipt of records and on appearance of the accused, framed charge for the offence under Section 8(1) of Abkari Act. To the charge, accused pleaded not guilty and claimed to be tried.

6. The prosecution therefore had PWs 1 to 6 examined and Exts.P1 to P8 marked. M.O.s I and II were got identified and marked.

7. After the close of the prosecution evidence, 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.

8. Finding that the accused could not be acquitted under Section 232 Cr.P.C, he was asked to enter on his defence. He had DW1 examined and Ext.D1 marked.

9. Relying on the evidence of PWs 1 and 2 and also the contemporaneous document namely, Ext.P2 which contains the narration of what had transpired and also impressed by the prompt production of accused and articles before court, the lower court formed the opinion that the offence had been made out. Accordingly, convicted and sentenced the accused as already mentioned.

10. Assailing the conviction and sentence, learned counsel appearing for the appellant contended that the mahazar prepared by PW1 does not contain the seal which he is alleged to have affixed on the sample. That is fatal to the prosecution. For the above proposition, learned counsel relied on the decision in **Gopalan vs. State of Kerala** (2012 KHC 812). Reference was also made to the evidence of PW1 who in his cross examination deposed about affixing of signature on the sample and the contraband article. It is also pointed out that the accused has produced Ext.D1 document which would show that the claim made by the prosecution that he was arrested from near the property of Muhammed Haji is false. This aspect has been

overlooked by the court below and that vitiates the conviction and sentence.

11. Learned Public Prosecutor, on the other hand, contended that the evidence of PWs 1 and 2 are consistent, uniform and cogent and there is nothing to show that they had any reason to falsely implicate the accused. Their evidence gets support from Ext.P2 mahazar which is self contained. It is clear that the sample was taken from the place itself and even though the mahazar does not contain the sample seal, forwarding note does contain the same. It is also important to notice, according to the learned Public Prosecutor, that Ext.P2 mahazar shows that sample and contraband have been sealed. It is not a case where there is absolute want of evidence regarding specimen seal used for sealing the sample and the contraband article. Accordingly, it is contended that the decision relied on by the learned counsel for the appellant cannot have any application to the facts of the case. Learned Public Prosecutor therefore contended that there are no grounds made out to interfere with the conviction and sentence.

12. The evidence of detection rests upon the testimony of PWs 1 and 2 who are Preventive Officer and Guard respectively. Both of them say that they had gone for routine patrol duty on the relevant date. They speak about having seen the accused with a sack in his hand. Their evidence is consistent in the manner in which the accused behaved on seeing the officers and the act of interception done by the officers. They are uniform in their version that PW1 seized the sack from the possession of the accused and on examination it was found to contain arrack. Both of them say that sample was taken and sealed and labeled the same so also the contraband article. PW1 speaks about having prepared Ext.P1 arrest memo, Ext.P2 mahazar etc. Their evidence show that they returned to the station and handed over the article, records and accused to the officer in station. Even though they were cross examined at length, nothing could be brought out in their evidence to show that they were speaking falsehood or they had any ill motive to falsely implicate the accused.

13. It is true that PWs 3 and 4, independent witnesses, have turned hostile to the prosecution. But that does not mean that the evidence of PWs 1 and 2 will have to be discarded. A reading of their evidence show a ring of truth and they had no axe to grind against the accused. Corroboration is only a rule of prudence and not a rule of law. Evidence of PWs 1 and 2 taken along with contemporaneous document goes a long way in establishing the prosecution case. Further, as rightly noticed by the court below, prompt production of article, records and accused before court rules out the possibility of any manipulation. In the decision in **Gopalan** vs. **State of Kerala** (2012 KHC 812), it was held as follows:

"5.Absence of the specimen impression of the seal itself may not be a ground to doubt the prosecution case, but considering the totality of the circumstances that also would assume much relevance because PW6 himself says that he had no occasion to see the seal used to seal MO1 and the sample bottle. Ext.P3, the property list though was produced before the Court on 31/10/1997 does not show that MO 1 and the sample bottle were affixed with the labels containing the signatures of the

accused and of the witnesses. Though it was stated by PW3 that a report was prepared and submitted by him to the Excise Inspector when he handed over the thondy articles to him, that report was not produced nor was a copy seen in the file maintained by them.

6. Graver the crime, greater should be the degree of proof required. The prosecution should not have rest content without producing the relevant documents and not following the procedure correctly. There is no document to show what was the seal used by PW3 to seal the sample and MO 1. The seizure mahazar (Ext.P1) was produced before the Court only on 17/09/1999. Considering all the aspects, it has to be said that the accused is entitled to the benefit of reasonable doubt. Hence, the conviction and sentence passed against the appellant are to be set aside”.

14. That was a case where there was want of evidence regarding the seal said to have been used by the officer concerned. The court was unable to ascertain the nature of seal said to have been affixed on the sample and the contraband article.

15. In the case on hand, the position is different. Ext.P6 forwarding note does contain the specimen of the sample seal

and the chemical analysis report Ext.P7 shows that the seals on the bottle were intact and found tallied with the sample seal provided by the court. Therefore, it can be seen that there is no merit in any of the contentions taken by the learned counsel for the appellant. The conviction has only to stand.

16. Faced with the above situation, learned counsel appearing for the appellant pointed out that 13 years have elapsed since the incident had occurred. The accused is advanced in age. Therefore, some leniency be shown with regard to sentence. There is no history of the accused having indulged in any nefarious activities. The sentence imposed should be proportionate to the offence committed and should also at the same time create a feeling in the mind of accused that he has yet another opportunity to reform himself. Viewed from this angle, it is felt that the sentence imposed is on the higher side and is not warranted in the facts and circumstances of the case.

Therefore, while upholding the conviction of the accused for the offence under Section 8(1) of Abkari Act, the sentence imposed is set aside and the accused is sentenced to suffer

simple imprisonment for two months and to pay a fine of Rs.1 lakh with default clause of simple imprisonment for one month. Set off as per law will be allowed.

Sd/-

**P.BHAVADASAN
JUDGE**

smp

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P.A to Judge.