

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 18TH DAY OF NOVEMBER 2015/27TH KARTHIKA, 1937

CRL.A.No. 130 of 2006 ()

**AGAINST THE JUDGMENT IN SC 171/2004 of ADDITIONAL SESSIONS COURT FAST
TRACK -II, PALAKKAD DATED 19-12-2005**

APPELLANT(S)/ACCUSED::

**ATHUTHAN, S/O. CHANTHU,
EDAPARAMBIL VEEDU, AMAYOOR DESOM, KOPPAM
OTTAPPALAM, PALAKKAD.**

BY ADV. SRI.VINOD KUMAR.C

RESPONDENT(S)/COMPLAINANT::

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

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 18-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 130 of 2006

Dated this the 18th day of November, 2015

J U D G M E N T

The accused was prosecuted for the offences punishable under Sections 55(a) and 8(2) of the Abkari Act. He was found guilty. He was therefore convicted and sentenced to suffer rigorous imprisonment for a period of one year and to pay a fine of ₹1 lakh with a default clause of six months. Set off as per law was allowed.

2. The incident which gave rise to the offence occurred on 19.06.2000. On that day, PW1, who was then functioning as the Excise Inspector of Pattambi Range, at about 6.00 p.m., set out for patrol duty along with other officers. They stopped the vehicle near the L.P. School and proceeded through the Panchayath road lying in front of the school. Then they saw the accused coming along the road carrying a can. As soon as he saw the Excise Officers, he panicked and tried to escape. He was intercepted and the

plastic can was seized and the contents were examined. The can had a capacity of 10 litres and it contained some liquid. On examination of the contents, it was found to be arrack. Arrest memo was prepared and the accused was arrested immediately. The 10 litres can contained about 7 litres of arrack. The entire articles were taken into custody. From the can, a sample of 300ml in a bottle having a capacity of 375ml was taken and both the sample bottle and the balance contraband articles were sealed and labelled as is required under law. Labels contained the signatures of the accused, the witnesses and also PW1. He has specifically stated that seal used by him is 'PVVP'. The seizure mahazar prepared by him is Ext.P1 and after the seizure, he returned to the Station and as per Ext.P3, he drew up the crime and occurrence report. He prepared Ext.P4 property list and also prepared the forwarding note namely, Ext.P5. He had the articles and the accused produced before the Magistrate on the next day itself. PW5

conducted further investigation of the case. He recorded statement of witnesses, obtained Ext.P6 Chemical Analysis Report, completed investigation and laid charge before court.

3. The court before which the final report was laid, took cognizance of the offence and finding the offences to be exclusively triable by a Court of Sessions, committed the case to Sessions Court, Palakkad under Section 209 of Cr.P.C. after following the necessary procedures. The said court made over the case to Additional Sessions Court, Fast Track-II, Palakkad 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 offences punishable under Sections 55(a) and 8 (2) of the Abkari Act.

5. To the charge the accused pleaded not guilty and claimed to be tried. The prosecution therefore had PWs 1 to 5 examined and had Exts.P1 to P6 marked. MO1 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.

7. 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.

8. The lower court found the evidence of PWs 1 and 2 the two officers, who had detected the offence, taken along with the contemporaneous document namely, Ext.P1 and also the fact that the articles and the accused were produced promptly before the court found the prosecution case to be convincing enough to hold the accused guilty. Conviction and sentence followed.

9. Assailing the conviction and sentence, the main ground raised by the learned counsel for the appellant is that while questioning under Section 313 of Cr.P.C. the

contents of the Chemical Analysis Report was not put to the accused and therefore that could not have been relied on as a material against the accused. In support of his contention, he relied on the decision reported in **Sivadasan v. State of Kerala** (2007 (3) KLJ 328) and **Prakash v. State of Karnataka** (2014 KHC 4255).

10. The learned Public Prosecutor on the other hand contended that it is not an invariable rule that the materials which were not put to the accused while questioning under Section 313 cannot be relied on. It is not an invariable rule that circumstances against the accused not put to him when questioned under Section 313 of Cr.P.C. can under no circumstance be relied on. The Apex Court has gone to hold that if no prejudice is caused to the accused, there is no harm in taking note of that material.

11. There cannot be much dispute regarding the fact that 7 litres of arrack was seized from the possession of the accused. The evidence furnished by PWs 1 and 2, among

whom PW1 was the Detecting Officer and PW2, who had accompanied him, are uniform and consistent in this regard. They speak about the occasion to meet the accused, the seizure of the can which he was carrying and also the detection of the contraband article. Both of them say about the sampling also. In fact, PW1 has clearly specified the seal which he had used to affix on the sample and on the balance contraband articles.

12. The evidence of PWs 1 and 2 get sufficient corroboration through Ext.P1 seizure mahazar, which contained a true narration of what had transpired at the place of occurrence. The fact that the accused, the articles seized and the documents were produced on the very next day itself before the court further fortifies the fact that there could not have been any manipulation or fabrication of documents or materials.

13. Coming to the points raised by the learned counsel for the appellant regarding the question under Section 313

of Cr.P.C., it is true that a vague question has been put to the accused in respect of the Chemical Analysis Report. The question is framed as the article was sent for chemical analysis and a report was obtained, what did the accused want to say about it. It is pointed out that the percentage of Ethyl Alcohol noticed by the Analyst was not specifically put to the accused and therefore, that could not be relied on.

14. Of course, in the two decisions relied on by the learned counsel for the appellant, it is stated that in such cases, that item of evidence could not be relied on.

15. However, one needs to be noticed that evidence of PWs 1 and 2 and also the contemporaneous records clearly show that the articles was seized from the possession of the accused. In fact, there is no table given in the Abkari Act stipulating the percentage of Ethyl Alcohol which would constitute spirit or arrack as the case may be. Even a small percentage of Ethyl Alcohol may qualify for holding a contraband article. In the case on hand, PWs 1 and 2 have

clearly stated that they were convinced that the article was arrack and there is no challenge to that version given by PWs 1 and 2. In the light of the above fact, the mere fact that the percentage of Ethyl Alcohol was not specifically put to the accused, has not caused any prejudice to the accused. Therefore, the decisions can be of no help to the appellant in this case.

16. The result is that the court below was perfectly justified in coming to the conclusion that the offences have been made out and the conviction has only to stand.

17. Faced with the above situation, the learned counsel for the appellant pointed out that the sentence imposed is disproportionate to the offence committed and the lapse of over ten years may have a bearing on the determination of the sentence in this case. It is also pointed out by the learned counsel for the appellant that there were no antecedents of criminal history and there is no subsequent event also which would show that he is prone to

such activity.

18. There seems to be some substance in the above contention. Considering the passage of time, the age of the accused and also the quantity seized, it is felt that a lenient view can be taken in this case so as to enable the accused to reform himself.

For the above reasons, while upholding the conviction of the accused for the offences under Sections 55(a) and 8 (2) of the Abkari Act, the sentence imposed is set aside and instead he is sentenced to undergo simple imprisonment for a period of one month and to pay a fine of ₹ 1 lakh, in default of payment of which he is to suffer simple imprisonment for two months. Set off as per law will be allowed.

Sd/-
P.BHAVADASAN
JUDGE

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P.A. to Judge