

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 3RD DAY OF NOVEMBER 2015/12TH KARTHIKA, 1937

CRL.A.No. 137 of 2006 ()

AGAINST THE ORDER/JUDGMENT IN SC 1135/2000 of ADDL. DISTRICT COURT
(ADHOC)-II, TRIVANDRUM DATED 04-01-2006 WHICH ARISE FROM THE
ORDER/JUDGMENT IN CP 106/2000 of J.M.F.C.-I,NEDUMANGAD

APPELLANT/ACCUSED.:

PARAMESWARAN NADAR,
S/O.RAGHAVAN NADAR, THADATHARIKATHU VEEDU, KILLIPPATHY
VAYAKKEKONAM, KURIYATHI, UZHAMALAKKAL VILLAGE.

BY ADVS.SRI.T.A.UNNIKRISHNAN
SRI.K.SATHEESH KUMAR

RESPONDENT/COMPLAINANT.:

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

BY PUBLIC PROSECUTOR SMT. S. HYMA.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 03-11-
2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

kp/-

P.BHAVADASAN, J.

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Crl.A.No.137 of 2006

Dated this the 3rd day of November, 2015

JUDGMENT

The accused was prosecuted for the offence punishable under section 55 (a) & (h) of the Abkari Act . He was found guilty of the same. He was therefore convicted and sentenced to suffer rigorous imprisonment for two years and to pay a fine of ₹ 1 lakh with a default clause of six months.

2. The incident in this case is said to have occurred on 4.1.2000. PW4 was the Assistant Sub Inspector of Police attached to the Palode Police Station. On the day of occurrence, he along with his team of officers had gone on patrol duty and while they were returning to the station, they received reliable information about distillation of illicit arrack near the uninhabited shed in the property of one Santha at Kuzhiyam. When they reached the said place, they found that on the southern side of the shed a person was engaged in distillation. They found articles used for distillation and they found that in fact arrack was dripping into the pot. The articles were seized and Ext.P1

mahazar was prepared. PW4 then returned to station and registered crime as per Ext.P2 FIR. The accused was produced before the court and articles seized were sent for preparing Ext.P3 property list. Soon after the crime was registered, according to PW4, S.I of Police Station came to the Police Station and he handed over all the articles, records and accused to him.

3. PW5 was the S.I. of the Police attached to the same Station. He took over the investigation in the evening of 4.1.2000. He took into his personal custody the accused as well as the articles produced by PW4. He had made a requisition to the court to take sample and sent it for chemical examination and Ext.P4 report was forwarded by him. Ext.P5 is the chemical analysis report. He recorded statement of witnesses, completed investigation and laid charge before court.

4. The court before which the final report was laid took cognizance of the offence. When that court found that offence is exclusively triable by the Court of Sessions, the said court committed the case under Section 209 of the Cr.P.C. to the Sessions Court, Thiruvananthapuram after complying with

necessary procedure. The Sessions Court, Thiruvananthapuram made over the case to the Additional Sessions Court, Fast Track-II for trial and disposal. The said court on appearance of the accused and receipt of records, framed charge for the offences punishable under section 55 (a) and (h) of the Abkari Act. To the charge, the accused pleaded not guilty and claimed to be tired. The prosecution therefore had PW1 to PW5 examined and Exts.P1 to P5 were marked. MOs 1 to 6 were got identified and marked.

5. After the closure of prosecution evidence, the accused was questioned under section 313 of the Cr.P.C. He denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent. He claimed that he was taken away from his house by the police by force. Finding that the accused could not be acquitted under section 232 of the Cr.P.C, he was asked to enter on his defence. He chose to adduce no evidence.

6. The court below considerably impressed with the evidence of PWs 2 and 3 and also the contemporaneous document Ext.P1 and prompt production of the accused soon

after the incident, came to the conclusion that the prosecution has proved his case beyond reasonable doubt and therefore, convicted and sentenced the accused as already mentioned.

7. Assailing the conviction, the learned counsel appearing for the appellant contended that the whole proceedings are vitiated due to the fact that PW4 who detected the offence is an incompetent officer as far as the Abkari Act is concerned as he is not a notified officer. Any act done by him therefore, as per the provisions of the Abkari Act, as an Abkari Officer, cannot be accepted. For the above proposition, the learned counsel relied on the decision reported in **Subash v. State of Kerala** (2008 (2) KLT 1047). Reliance was also placed on the decision reported in **Sabu v. State of Kerala** (2007 (3) KHC 753). Emphasis was laid also on the decision reported in **Hashim v. Assistant Sub Inspector** (2014 (2) KLT 346).

8. Further, the learned counsel pointed out that it is quite evident from the evidence of PWs 3, 4 and 5 that no sample was taken from the spot and the requisition was made to the court to take sample. The evidence was to the effect that the sample was

sent for analysis. But then there is no evidence to show as to who had taken the sample, from where and under what authority. There is no guarantee therefore, according to the learned counsel that the sample sent for analysis is the sample taken from the contraband seized from the possession of the accused.

9. The learned counsel further pointed out that it is true that PW4 says that he was in charge of the S.I., as the S.I had gone out. But according to the learned counsel, unless and until the evidence is given to that effect, it cannot be said that he has the status of an S.I. Even assuming it be so, then also it does not shut the character of an A.S.I. and as long as he is not a notified Officer under the Abkari Act he cannot detect the offence or investigate the same. These vital aspects, according to the learned counsel, have been omitted to be noticed by the court below and that has resulted in an unmerited conviction.

10. The learned Public Prosecutor attempted to justify the findings of the court below. But the learned Public Prosecutor had no answer to the issue raised regarding the competency of

the person who detected the offence and also regarding the taking of the sample.

11. The evidence of detection of the offence remains confined to the testimony of PWs 3 and 4, who give a uniform version of the incident. Both of them say that they had gone on routine patrol duty and while returning to the station, they received reliable information about the clandestine activity carried on by the accused. They say that they reached the place and in the presence of independent witnesses, the accused was found engaged in the act of illicit distillation. Both of them say about the seizure of articles found there and then returned to the Station. PW4 goes on to say that as soon as they reached the station, he registered the FIR and when the S.I. came to the Police Station, he handed over the articles and accused to him.

12. From the record it is seen that there is 11 days of delay in producing the articles before the court. The reason given by the prosecution is that there were no vehicle available in the Police Station and so articles could not be brought to the court.

13. It is too difficult to believe such a story. Normally, a police officer will be deputed from every station to attend to the criminal court and there would have been no harm at all to entrust him the documents and articles which are to be produced in the court. The explanation offered by PW5 seems incredible and unbelievable.

14. In the decision reported in **Ramankutty v. Excise Inspector, Chelannur Range** (2011 (3) KHC 308), on the question of delay this court held that unexplained delay in producing the contraband before the court after seizure is fatal to prosecution case. This unexplained delay adds further agony to the prosecution. It does not stop there.

15. As rightly pointed out by the learned counsel for the appellant, none of the documents show that sample was taken from the spot. Nor is there any evidence to show that it was taken from the police station when the accused was present. But the evidence of PW5 would suggest that it was taken at a later point of time from court and sent for chemical examination. On going through the evidence, that seems to be true. If that be so,

it was absolutely necessary and essential for the prosecution to examine the person who had drawn the sample from the court and sent it for chemical examination. There was no such attempt from the side of the prosecution.

16. In the decision cited by the learned counsel for the appellant, it has been held that detection and investigation by an incompetent Officer is non-est in law and no proceedings can be initiated or continued on the basis of such a report. Of course, PW5 says that he was in charge of the station in the absence of the S.I and except for the ipse dixit, there is nothing to show that what he says is true. The result is that the above three grounds have not been considered by the court below at all. There is no consideration of the above aspects by the court below. Once it is held that the detention was by an incompetent Officer the whole case falls to the ground.

17. Relying on the decisions referred to by the learned counsel for the appellant, it is held that prosecution has not succeeded in establishing the case against the accused beyond reasonable doubt. If that be so, he is entitled to an acquittal.

For the above reasons this appeal is allowed, the conviction and sentence passed by the court below are set aside. The accused stands 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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