

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 29TH DAY OF OCTOBER 2015/7TH KARTHIKA, 1937

CRL.A.No. 172 of 2006

AGAINST THE JUDGMENT IN SC 311/2003 of ADDITIONAL SESSIONS COURT
FAST TRACK COURT No.I (ADHOC), MANJERI DATED 21.12.2005

APPELLANT/ACCUSED::

CHANDRAN, S/O. VELU CHETTIAR,
POOVALLI VEEDU, VAZHIKKADAVU AMSOM, KARAKKODE DESOM,
NILAMBUR.

BY ADV. SRI.K.P.MUJEEB

RESPONDENT:

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

BY SMT. LILLY LESLIE, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
29-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.172 OF 2006

Dated this the 29th day of October, 2015.

J U D G M E N T

The accused was prosecuted for the offence punishable under Section 55(g) of Abkari Act. He was found guilty and was convicted and sentenced to suffer rigorous imprisonment for one year and to pay a fine of Rs.1 lakh with default clause of simple imprisonment for six months. Set off as per law was allowed.

2. The incident in this case is alleged to have occurred on 10.09.2001. On that day, PW2 along with PW1 and other officers were on routine patrol duty and when they reached a place called 'Alakanchola', they found the accused stirring something in a pot and seeing the Excise Officials he ran away from the place. Even though accused was chased, he could not be apprehended. Excise Officers saw two persons collecting firewood nearby and they were called and in their presence, the contents of the pot was examined. It was found to be wash. Nine other such pots also contained wash. PW2 says about having taken sample of

700ml in a bottle having a capacity of 750ml and sealed and labeled the same. He says that the rest of the contraband article was destroyed at the place itself and on the samples and the pots labels were affixed. He prepared Ext.P1 mahazar and he along with the records and articles seized returned to the Station. At the relevant time, PW3 was the Excise Inspector. He received the articles and documents produced by PW1 and after preparing Exts.P3 and P4, property list and forwarding note, produced the articles before court on the very next day itself. He obtained Ext.P5 chemical analysis report and laid final charge.

3. The court before which final report was laid took cognizance of the offence and on 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 Fast Track Court No.1 (Ad hoc), 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 55(g) of Abkari Act. To the charge, accused pleaded not guilty and claimed to be tried.

4. The prosecution therefore had PWs 1 to 3 examined and Exts.P1 to P6 marked. M.O.1 was got identified and marked.

5. 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.

6. 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.

7. On appreciation of evidence, court below found that the prosecution has succeeded in establishing the case against the accused and therefore convicted and sentenced him as already mentioned. The conviction and sentence are assailed in this appeal.

8. Learned counsel appearing for the appellant raised an issue regarding the identity of the accused as the main point in support of his case. It is pointed out that there is no case for prosecution that the accused was familiar to PWs 1 and 2 and at the time of evidence an attempt is made to show that he was

familiar to them. It is true, according to the learned counsel, that PW1 says that he had occasion to see the accused on earlier occasions. If that be so, according to the learned counsel, obviously, the narration in Ext.P1 would have been that a person who was identifiable by sight ran away from the place and it could not have been as if a total stranger ran away from the place. The absence of any mention regarding the familiarity with the accused shows that the evidence given in court is an afterthought to cure the defect of identification.

9. Learned counsel appearing for the appellant invited the attention of this Court to paragraphs 9 and 10 of the judgment of the court below and pointed out that the court below has proceeded on the basis of conjectures and surmises and the statements that PWs 1 and 2 were able to identify the accused and that they have stated so are not correct. Learned counsel also pointed out that the observation of the court below that when the accused was taken into custody, the witnesses had identified him is absolutely false. There is no such evidence before court. In fact, according to the learned counsel, the

officer who had arrested the accused is not even examined before court. There is no evidence of arrest of the accused at all. Learned counsel, in support of his case that there is no proper identification in the case on hand, relied on the decisions in **Roy K.A vs. State of Kerala** (2012 (2) KHC 768) and in **Anandan vs. State of Kerala** (2007 (3) KHC 599). Learned counsel went on to contend that in the absence of proper identification, even assuming that the contraband article was seized, the accused is entitled to acquittal.

10. Learned Public Prosecutor, on the other hand, tried to support the findings of the court below and pointed out that PWs 1 and 2 had gathered details of the accused from two persons who were collecting firewood from the place. It is also pointed out that PWs 1 and 2 had stated that they had occasion to see the accused on previous occasions and if that be so, there was no difficulty for them to identify him. This statement made by the official witnesses was accepted by the court below and there is no reason to take a different view. There is no basis for raising an issue regarding identification as the accused has been

properly identified by PWs 1 and 2 before court. Therefore, it is contended that there is no merit in the appeal at all.

11. After hearing the learned counsel for the appellant and the learned Public Prosecutor, the main issue appears to be identification of accused. There is nothing in Ext.P1 to show that accused was familiar to either PW1 or PW2 or that they had any reason to meet him previously. There is a statement in Ext.P1 that on receiving complaints, they had occasion to visit the house of the accused. If that be true, on being convinced that it was he who ran away from the place they did not have enquired about the whereabouts of the accused from the persons who were collecting firewood in the place and they had straight away gone to his house. There is no such case for the prosecution. Therefore the said narration can be taken only with a pinch of salt. Further, if, as a matter of fact, accused was familiar to the detecting officer, normally the recital in Ext.P1 would have been that a person identifiable by sight ran way from the site. One could discern from a reading of Ext.P1 and the evidence of PWs 1 and 2 that the very details regarding the person who ran away

from the place were collected for the first time from the two persons who were collecting firewood nearby and till then neither PW1 nor PW2 had any familiarity. As rightly pointed out by the learned counsel for the appellant, in paragraphs 9 and 10 of the judgment of the court below, the court below seems to have been observed that the accused has been identified before court. The court below goes to the extent of saying that when the accused was taken in to custody, the witnesses have identified him. In spite of best efforts made by this Court, this Court could not find any material on record in justification of the above conclusion drawn by the court below. None of the witnesses say so.

12. What is interesting is that the officer who had arrested the accused was not even examined and the two independent witnesses who gave information regarding the identity of the accused were also not examined. The court below says that summons were issued and it was found that they were not available in the address shown in the final report. It is trite that merely because summons was issued, it does not mean that they are not available. It is the duty of the court to take all possible

steps to procure the appearance of the witnesses including coercive steps if required. A simple statement that they are not available is not justifiable in law. The court below was wrong in observing that PW1 had identified the accused. In spite of a very close reading of his evidence, there is nothing to show that he had identified the accused and he was familiar to him. The infirmity in the evidence of PW2 in this regard had already been referred to.

13. It will be useful here to refer to the decisions relied on by the learned counsel for the appellant. In the decision in **Roy K.A vs. State of Kerala** (2012 (2) KHC 768), it was observed in paragraph 5 as follows:

“According to PW4, the appellant was identified by the police constable, P.C. Sebastian. There is no case for PW4 that during the course of investigation, the appellant was arrested or that his identity was ascertained during the course of investigation. Prosecution has no good explanation for not examining the police constable, P.C. Sebastian, who alleged to have identified the appellant. The result is that there is no direct evidence proving the identity of the appellant. Since PWs 1 and 4 had not identified the appellant at the spot or during the

course of investigation, their evidence identifying the appellant for the first time in the witness box is not admissible to sustain conviction. For want of non-examination of the police constable, Sebastian, who alone was familiar with the appellant, the prosecution should fail. Therefore, the conviction and sentence under challenge are not sustainable and liable to be set aside”.

14. In the decision in **Anandan vs. State of Kerala** (2007 (3) KHC 599), it was observed in paragraph 11 as follows:

“Both PWs 1 and 4 would say that while they reached Devagiri junction on patrol duty at about 4 p.m on 01/09/2003 they got a credible information to the effect that Anandan of Anandhbhavan was vending illicit arrack. Accordingly, after parking the jeep at Devagiri junction when they proceeded on foot along the bank of the canal and reached near R.K. Bhavan a person standing on the bank of the canal was found pouring some liquor into a glass tumbler held by another person from out of a white jerry can and seeing the police party both the said persons after abandoning the can and glass tumbler made good their escape. PWs 1 and 4 claim to have seen the said persons from a distance of about 50 metres which will be more than 160 feet. Both of them do not have any previous acquaintance of those two persons. Going by their evidence they

would have had only a fleeting glimpse of the two persons from a distance of more than 160 feet. This is hardly sufficient to subsequently identify those persons, particularly, when PWs 1 and 2 have no claim that they had noted any of the identifying features of those two persons. PW1 has confessed that he did not on that day arrest the accused standing in the dock and that none of the identifying features of the accused has been stated in Ext.P1 contemporaneous mahazar prepared by him from the spot itself..... The same is the position with regard to PW4 as well. It is these two official witnesses who for the first time in Court after a lapse of more than three years identified the appellant as one of the two persons who fled from the scene. Much strain is not needed to conclude that the identification of the accused by these two witnesses cannot be accepted”.

15. On going through the facts of the above cases, there appears close similarity to the facts of the present case. It is significant to remember that the accused was not arrested from the spot and there is no evidence at all to show as to who had arrested him and when he was produced before court. Under these circumstances, it is difficult to accept the finding of the court below that the identity of the accused has been properly

established. The said finding is far from true. There is reasonable doubt regarding the identity of the accused. If that be so, it could not be said that the contraband article was seized from his possession.

For the above reasons, this appeal is allowed. The conviction and sentence passed by the court below are set aside. It is held that the accused is not guilty of the offence under Section 55(g) of Abkari Act. He stands acquitted of the charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

Sd/-

**P.BHAVADASAN
JUDGE**

smp

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P.A to Judge.