

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 2ND DAY OF NOVEMBER 2015/11TH KARTHIKA, 1937

CRL.A.No.178 of 2006

AGAINST THE JUDGMENT IN SC 21/2005 of ADDITIONAL SESSIONS COURT
FAST TRACK - I, PALAKKAD DATED 05-01-2006

APPELLANT/ACCUUSED:

CHANDRAN, S/O.MANI @ NARAYANAN,
AGED 36 YEARS, YAKKAMPOTHUVAYIL HOUSE,
CHEENIKADAVU DESOM, PULAPATTA, KADAMPAZHIPPURAM,
OTTAPALAM TALUK, PALAKKAD DISTRICT.

BY ADV. SRI.RAJESH SIVARAMANKUTTY

RESPONDENT/COMPLAINANT:

STATE OF KERALA, REPRESENTED BY THE
EXCISE INSPECTOR, MANNARKKAD EXCISE RANGE (CRIME
NO.8/01), PALAKKAD DISTRICT BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY SMT. LILLY LESLIE, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
02-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 178 of 2006

Dated this the 2nd day of November, 2015.

JUDGMENT

The accused was prosecuted for the offence punishable under Section 55(a) of the Abkari Act. He was found guilty and therefore convicted 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 three months.

2. The incident in this case is said to have occurred on 6.6.2001. On the relevant date, P.W.1 was the Excise Inspector of Excise Office, Mannarkkad. While, he along with his team of officers were on patrol duty and they were passing the Ponniyankunnu – Valiyatta road, they happened to see the accused coming along the road with a can. Can was seized and it was examined. It was found to contain 3 litres of liquid. By taste and smell, it was identified as arrack. 375 ml was

taken as sample and both the sample and the can were sealed and labels were affixed. Ext.P1 mahazar was prepared. The accused was arrested as per Ext.P2 arrest memo. He returned to the Circle Office and registered Ext. P3 occurrence report. He handed over the accused, articles and the documents to the Excise Inspector at Mannarkkad. Ext.P4 is the copy of the forwarding note. P.W.1 produced the accused, the articles and the records before P.W.3, Excise Inspector, Mannarkkad Range. He re-registered crime as per Ext.P5. He produced the articles before the court on the same day itself. P.W.6 conducted investigation, took statements of witnesses, procured Ext.P6 site plan, requested the court to send the articles for chemical examination, completed investigation and laid final charge before court.

3. The court, before which final report was laid took cognizance of the offence. Finding that the offence is exclusively triable by a court of Sessions, the said court

committed the case to Sessions Court, Palakkad. The said court made over the case to Additional Sessions Court Fast Track No.I, Palakkad for trial and disposal.

4. The latter court, on receipt of records and on appearance of the accused framed charge for the offence punishable under Section 55(a) of the Abkari Act. To the charge, the accused pleaded not guilty and claimed to be tried. The prosecution therefore examined P.Ws. 1 to 6 and had Exts.P1 to P7 marked. M.O. 1 was got identified and marked. After the close of the 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. He denied having done any act. Finding that the accused could not be acquitted under Section 232 Cr.P.C., he was asked to enter on this defence. He chose to adduce no evidence.

5. Based on the evidence of P.Ws.1 and 2 and also the fact that the articles and the records were promptly produced before the court, the court below formed the opinion that the case against the accused has been established beyond reasonable doubt and conviction and sentence as already mentioned followed.

6. Assailing the conviction and sentence, learned counsel for the appellant contended that the conviction of the accused is solely based on the evidence of P.Ws.1 and 2. Another contention taken is that only one sample was taken by P.W.1 and atleast two samples should have been taken. It is also pointed out that according to the prosecution case, from the 3 litres of arrack in the can, 375 ml alone was taken as sample. M.O.1 was produced before the court and at the time of trial, can was found to be empty and it causes serious prejudice to the accused. It is also contended that P.W.6, the

Investigation Officer has not even questioned the principal witnesses in this case. These infirmities have been conveniently overlooked by the court below. For the above reason, it is pointed out that the accused is entitled to acquittal.

7. Learned Public Prosecutor on the other hand contended that the evidence of P.Ws. 1 and 2 stands scrutiny and their evidence is further fortified by the records in the case. The court below has chosen to accept their evidence and there is no reason as to why their evidence should not be accepted. It is not suggested to P.Ws. 1 and 2 that they had any oblique motive to falsely implicate the accused. Learned Public Prosecutor further pointed out that the prompt production of the accused and the article seized before the court would further strengthen the prosecution case that the incident had occurred as alleged. At any rate, according to the learned Public Prosecutor, now that the lower court has found

the accused guilty and unless the said finding is found to be perverse, interference is not called for.

8. As rightly pointed out by the learned counsel for the appellant and the learned Public Prosecutor, the evidence regarding actual detection is confined to the testimony of P.Ws. 1 and 2. They had along with two other officers had gone on patrol duty and on their way, they found the accused coming along the road with a can. They intercepted the accused and the can was seized which was found to contain three litres of arrack.

9. P.W.1 would say that according to his memory, the accused was coming from south to north. It is true that there is some confusion regarding the direction in which the accused had come. But that is an insignificant factor to be taken note of in the light of the evidence given by P.W.2 and mahazar prepared in the case.

10. Both P.Ws. 1 and 2 gave an uniform version of the incident. They gave evidence to the effect that on the date of the incident they have gone on patrol duty and during the patrol duty, they have located the accused and crime was detected. P.W.1 then makes mention of the fact that Ext.P1 was prepared at the spot. It is to be noticed that Ext.P1 contains all the necessary details and it is also significant to notice that the accused, the occurrence report and the mahazar were produced before the court on the next day itself thereby ruling out any possibility of fabrication or manipulation. Ext.P1 is the contemporaneous document and it gives strength to the prosecution case as spoken to by P.Ws. 1 and 2.

11. It is very vehemently contended that only one sample has been taken by the officer concerned and that is insufficient in law. Excise Manual is relied on for this purpose.

12. In fact, the Abkari Act does not contemplate taking of sample at all and it is governed by judicial precedence. Except in case as already stated, the statute insists for taking of two samples. None of those situations exist in the present case. There is no right given to the accused to have any sample examined at his behest.

13. The contention therefore that since only one sample is prepared, that assuming to be true, cannot vitiate the proceedings. The officers has complied with the provisions in the strict sense. It was then contended that M.O.1 was found empty at the time of trial and according to the prosecution, it contains little less than 3 litres, i.e., out of the three litres, 375 ml has been taken as sample and balance would have been there. But it was found to be empty at the time of trial. Therefore, there is no guarantee that M.O.1 produced in court was the article seized from the possession of the accused.

14. The mere fact that the can found empty is not correct. There is no case for the accused that the seal on M.O.1 was tampered with. In the absence of any tampering with the seal, it cannot be said that M.O.1 produced before court is not the article seized from the accused. Finally it is pointed out that P.W.6, the Investigating Officer ought to have questioned P.W.1. Quite so. The mere fact that statement of P.W.1 was not taken by P.W.6 does not vitiate the proceedings. It is well settled that witnesses who are not questioned by the Investigating Officer can be examined and it is for the court to decide whether their evidence should be accepted or not. Therefore, there is no reason to doubt the claim made by P.Ws. 1 and 2 that they had occasion to locate the accused while on patrol duty with the contraband article. The finding of the court below in this regard is only to be confirmed.

15. However, there is one flaw. There is no case for the prosecution that possession of the contraband article was

for export or import, in that case Section 55(a) cannot be attracted and only Section 8(1) can be attracted to the facts of this case.

16. Faced with the above situation, learned counsel also pointed out that period of imprisonment imposed is very heavy and is not warranted on the facts of the case. The quantity seized is not too large and there is no antecedent history for the accused of having involved in crimes. It is also pointed out that 15 years have elapsed since the detection of the offence and things might have settled and therefore some leniency may be shown with regard to sentence.

17. After having given anxious consideration to the various aspects, and considering the passage of time and also the fact that several things would have settled, it is felt that the sentence imposed is slightly on the high side and some leniency can be shown to the accused.

In the result, this appeal is partly allowed and while confirming the conviction of the accused, the sentence awarded by the court below is set aside and the accused is sentenced to undergo rigorous imprisonment for three months and to pay fine of Rs.1,00,000/- with default sentence of simple imprisonment for two months. Set off as per law was allowed.

P. BHAVADASAN,
JUDGE

sb.