

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 27TH DAY OF NOVEMBER 2015/6TH AGRAHAYANA, 1937

CRL.A.No. 311 of 2006 ()

AGAINST THE JUDGMENT IN SC 18/2004 of ADDL.DISTRICT AND
SESSIONS COURT FAST TRACK (ADHOC-I), KOZHIKODE.

APPELLANT(S)/ACCUSED:

KRISHNAN, S/O.KELAN,
THARIPPAKKUNI MALAVEETIL,
KOKKALLUR AMSOM DESOM,
KOYILANDY, KOZHIKODE DIST.

BY ADV. SRI.SANTHARAM.P

RESPONDENT(S)/COMPLAINANT:

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

BY PUBLIC PROSECUTOR SMT. S. HYMA.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
27-11-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 311 of 2006

Dated this the 27th day of November, 2015.

JUDGMENT

The accused was prosecuted for the offences punishable under Sections 8(1) and (2) of the Abkari Act. He was found guilty. He was therefore convicted and sentenced to undergo rigorous imprisonment for two years and to pay fine of Rs.1,00,000/-, in default, to undergo simple imprisonment for six months. Set off as per law was allowed.

2. The prosecution case is that on 16.02.2002 while P.W.1 was working as Preventive Officer of Balusserry Excise Range, he along with the other officers had gone on routine patrol duty and on the way, they got down from the jeep and when they were walking along the road, they saw the accused coming along the road with a plastic can. On seeing the police, he tried to conceal the can and feeling suspicious, he was intercepted, the can was seized and contents

examined. The can having a capacity of 5 litres contained 4 litres of arrack. By taste and smell, the liquid was identified as arrack. Ext.P1 is the arrest memo. The contraband article found in the possession of the accused was seized and from that contraband article sample of 180 ml was taken. Both the sample and the balance contraband article were sealed and labelled and the label contained the signature of the accused, witnesses and himself. P.W.1 says that the seal affixed is his seal and he then says about having produced the accused, articles and the documents before the office concerned and registered crime as per Ext.P3 occurrence report.

3. P.W.5 was the Preventive Officer of Balussery Excise Range. P.W.5 says about having prepared the forwarding note Ext.P6 and sent it to court along with the articles on 16.2.2002, which according to him, were returned due to strike of the staff of court. Thereafter, the articles were produced before court on 13.3.2002. Property list is marked

as Ext.P5.

4. Investigation was conducted by P.W.6. He recorded statements of witnesses, obtained the chemical analysis report, completed investigation and laid charge before court.

5. The court, before which final report was laid, took cognizance of the offences. Finding that the offences are exclusively triable by a court of Sessions, the said court committed the case to Sessions Court, Kozhikode. The said court made over the case to Additional District and Sessions Court Fast Track (Adhoc-I), Kozhikode for trial and disposal.

6. The latter court, on receipt of records and on appearance of the accused, framed charge for the offences punishable under Sections 8(1) and (2) of the Abkari Act. To the charge, the accused pleaded not guilty and claimed to be tried. The prosecution, therefore, had P.Ws.1 to 6 examined 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. 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. On appreciation of the materials before it, the court below came to the conclusion that the offence has been made out and conviction and sentence as already mentioned followed. The said conviction and sentence are assailed in this appeal.

7. Learned counsel appearing for the appellant raised two grounds, and they are, (1) there is considerable delay in producing the seized articles before court and no reasonable explanation has been offered for the delay. There is no clear evidence as to who was in custody of the articles till they were produced before court, and (2) the investigating

officer was under no obligation to personally present the forwarding note immediately and in this case it was produced much latter and that also is fatal to the prosecution. It is also contended that only one sample was taken and that is not proper and as per the law minimum of two samples are required.

8. Learned Public Prosecutor on the other hand contended that the court below, on a proper appreciation of the evidence of P.Ws.1 and 2 found the accused guilty and there is no evidence to indicate that they were not speaking the truth or they had ill-motive to falsely implicate the accused. Learned Public Prosecutor contended that no grounds are made out to interfere with the finding of the court below.

9. As regards the first contention, learned counsel for the appellant relied on the decision reported in Ravi v. State of Kerala (2011 (3) K.L.T. 353). Before going into that decision, it is useful to refer to two decisions relied on by the

learned counsel, i.e., the decision reported in *Dominic v. State of Kerala* (1989 (1) K.L.T. 601) and *Alex v. State* (2003(1) K.L.T. SN 9 Case No. 12) in support of his contention that seized article should be produced forthwith before court. That issue was considered by the Division Bench in the decision reported in *Ravi v. State of Kerala* (2011(3) K.L.T. 353) wherein this Court, after referring to the decisions on the point till then, held as follows:

“5. In *Dominic v. State of Kerala* (1989 (1) KLT 601) a learned Single Judge of this Court referring to the provisions in the Excise Manual Volume II read with S.36 of the Abkari Act, took the view that if those provisions are read together it is clear that seizure of property should be reported to the Court “forthwith” and request for sending a sample for analysis to be made expeditiously. Paragraphs 17,26,34,49 and 77 of the Excise Manual were relied on in this connection. The above view was reiterated by another Single Judge of this Court in *Alex v. State of Kerala* (2003(1) KLT SN 9 (C.No.12)). In *Kunhikannan v. State of Kerala* (2006 (4) KLT 469) also yet another Judge of this Court held that

the delay of 14 days in producing the seized articles before the Court was fatal to the prosecution. In *Vikraman v. State of Kerala* (2007 (1) KLT 1010) which was overruled on another point in *Subash v. State of Kerala* (2008 (2) KLT 1047 (D.B.)), it was observed that even though under S.102(3) Cr.P.C the property seized should be forwarded to the Court “forthwith”, the said provision does not contain the consequence of noncompliance and therefore, if proper explanation for the delay is offered, such delay by itself is not fatal to the prosecution.

Section 102(3) Cr.P.C reads as follows:–

“Every police officer acting under sub-section (1) shall forthwith report the seizure to the Magistrate having jurisdiction and where the property seized is such that it cannot be, conveniently transported to the Court or where there is difficulty in securing proper accommodation for the custody of such property, or where the continued retention of the property in the Police custody may not be considered necessary for the purpose of investigation, he may give custody thereof to any person on his executing a bond undertaking to produce the property before the Court as and when required and to give effect to the further orders of the

Court as to the disposal of the same.”

There is no statutory mandate under the above provision to “forthwith” produce the properties before the Court. What is insisted on is that the seizure of the property should be forthwith reported to the Court. But that does not mean that the detecting or Investigating Officer can produce the property leisurely, particularly when the nature and contents of the property can be convincingly established only through expert opinion obtained either in the form of chemical analysis or the report of a forensic or other expert for which the property should reach the court without unreasonable delay. Delayed production before court of the seized property (wherever it is practicable) is likely to be frowned upon by Courts because of the possible misuse or tampering with of such property while in the custody of the officer concerned. There is also the chance of such property getting misplaced.

6. Section 36 of the Abkari Act only mandates that all searches under the said Act can be made in accordance with the Cr.P.C. S.40 of the Abkari Act reads as follows:–

Procedure on arrest and seizure.-- (1)(a) Any Officer arresting a person under Section 31, Section 34 or

Section 35 shall inform him of the grounds for such arrest.

(b) Where an Abkari Officer arrests without warrant any person other than a person suspected of, or accused of, any non-bailable offence under this Act, such Officer shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf.

(2) Every person arrested under Section 30 shall be produced before, and the article seized under that section shall be forwarded to, without unnecessary delay, the Magistrate or the Commissioner, as the case may be, by whom the warrant was issued.

(3) Every person arrested under Section 31 or Section 34 or Section 35 shall be produced before, and article seized under Section 34 shall be forwarded to, without unnecessary delay,–

(a) to the Officer in charge of the nearest Police Station;
or

(b) to the Officer empowered under Section 5A, or to the Abkari Inspector.

(4) The authority or officer before whom any person is produced under sub-section (2) or sub-section (3) shall, take expeditious steps as provided in Section 41.

(5) The authority or Officer to whom any article is forward under sub-section (2) or sub- section (3) shall, with all convenient despatch, take necessary steps in accordance with law for disposal of such article.

Under sub-s.(3) of S.40 it is provided that every person arrested and every article seized shall be forwarded without unnecessary delay to the officer in charge of the nearest Police Station or to the officer empowered under S.5A of the Abkari Act or to the Abkari Inspector. Here also there is no statutory mandate to “produce” the property before the Court “forthwith”. But the very fact that the statute insists on production of the property before an officer of a particular designation or rank is to ensure that there is no misuse of the property. Likewise, unless the property is before Court, there cannot be a proper ascertainment of the nature and content of the property by questioning the service of an expert through the instrumentality of the Court. Hence, production of the property before Court without unreasonable delay is also a necessary requirement of law. Delay in producing the property before Court, by itself, cannot be fatal to the prosecution if the delay can be satisfactorily explained (See *Vikraman v. State of*

Kerala (2007 (1)KLT 1010)).

7.

8. We, therefore, answer the reference as follows :–

1. It is not necessary to produce the article seized under S.34 of the Abkari Act before the Magistrate “forthwith” either by virtue of S.103(2) Cr.P.C or by virtue of any of the provisions of the Abkari Act or the Abkari Manual. What is enjoined by the statute is only that the seizure of the property should be reported forthwith to the Court. But we hasten to add that the production of the property before Court (wherever it is practicable) should also take place without unnecessary delay. There should be explanation for the delay when there is delayed production of the property.

2. There is no violation of S.40(3)(b) of the Abkari Act if the arrested person or the seized property is produced before an officer who is holding charge of the Excise Inspector, notwithstanding the fact that he is of a rank lower than that of an Excise Inspector.”

10. It was made clear by this Court that there is no provision under the Abkari Act where it is insisted that the article seized should be produced before the court forthwith.

What is intended is that production at the earliest alone is required. But the Division Bench was cautious enough to mention that that does not mean that the article can be produced at the will and pleasure of the investigating officer. If there is delay, that has to be properly explained.

11. In the case on hand, the report of seizure was made on the very same day of the seizure itself as could be seen from the entry in the mahazar and also in the property list. P.W.1 has stated that date of detection was on Saturday and next day was Sunday and therefore the articles were produced only on 18.2.2002. The endorsement by the court which received the articles shows that from 18.2.2002 the staff of the court were on strike and therefore the court was not in a position to receive the articles and they were directed to be kept in the custody of the Excise Inspector concerned. P.W.1 has stated that he was in custody of the same. Therefore, the said contention does not hold water. There is

no delay at all.

12. There is no rule or provision of law which insists that forwarding note should be produced forthwith or produce along with the property in court. Forwarding note is usually prepared by the investigating officer and submitted before court. Delay in filing the forwarding note may have some significance, because that may cause delay in sending the articles for chemical analysis. But that has relevance only when the delay may bring out a change in the composition of the sample which is send for chemical examination. There is no such situation in the case on hand. Therefore, the mere fact that P.W.5 has stated that forwarding note was prepared on the same day but produced later has not caused any prejudice to the accused.

13. The third contention regarding the sampling is also baseless. In fact taking of two samples is insisted only in Kerala Abkari Shops Disposal Rules, wherein it is insisted that

at least two samples will be taken while taking sample from a licensed shop. That cannot be imported to the case on hand. The seal on the sample taken and sent for examination found tallies with the specimen seal produced for comparison. Moreover, in the case on hand, the sample seal is very much available in the forwarding note. This contention too has to fail.

14. The court below was justified in coming to the conclusion that the offence has been made out. No grounds are made out to interfere with the finding of the court below that the accused is guilty of the offence alleged against him.

15. Coming to the sentence, it is felt that a slight leniency can be shown with regard to the same.

16. After having given anxious consideration to the various aspects, and considering the nature of the offences committed by the accused, the quantity seized, the age of the accused, it is felt that the sentence calls for a lenient view with

regard to the sentence.

In the result, while confirming the conviction of the accused for the offences under Sections 8(1) and 8(2) of the Abkari Act, the sentence imposed is set aside and the accused is sentenced to suffer simple imprisonment for a period of six months and to pay Rs.1,00,000/–, in default, to undergo simple imprisonment for two months. Set off as per law was allowed.

P. BHAVADASAN,
JUDGE

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