

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.355 of 2006

AGAINST THE JUDGMENT IN SC 453/2004 of ADDL.DISTRICT & SESSIONS
COURT FAST TRACK (ADHOC-I), KOZHIKODE DATED 13-02-2006

APPELLANTS/ACCUSED NOS.1 TO 3:

1. SURENDRAN, S/O. KRISHNAN,
POOZHITHALA, VADAKARA TALUK.
2. BABU PAREMMAL, S/O. KANNAN,
AYANCHERRY AMSOM, KOYILANDY TALUK.
3. RAMACHANDRAN KELOTH, S/O. KUNHAPPAN,
PURAMERI AMSOM, VADAKARA TALUK.

BY ADV. SRI.SUNNY MATHEW

RESPONDENT/COMPLAINANT:

STATE OF KERALA, THROUGH THE
EXCISE INSPECTOR, VADAKARA EXCISE RANGE,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY SMT.S. HYMA, 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. 355 of 2006

Dated this the 2nd day of November, 2015.

JUDGMENT

The accused were prosecuted for the offence punishable under Section 55(a) of the Abkari Act read with Rule 9 of the Foreign Liquor Rules. They were found guilty. They were convicted and each of them was therefore sentenced to undergo rigorous imprisonment for five years and to pay fine of Rs.1,00,000/- each with a default sentence to undergo rigorous imprisonment for six months. Set off as per law was allowed.

2. On 2.3.2002, when P.Ws. 1 and 4 were manning the Azhiyur Check Post, they happened to see an autorickshaw bearing registration No.KL-11/F 5457 coming along the way. They signalled it to stop. It did not stop and went ahead. The autorickshaw was followed and in front of the Azhiyur Block Office the vehicle was intercepted. Apart from the driver of the autorickshaw, there were two other persons in the

autorickshaw. Three cardboard cartons and two plastic bags were found in the vehicle. On examination, they were found to contain liquor. All the three persons were arrested. Ext. P1 series are the arrest memos. The three cardboard cartons contained of 8 bottles of Sonia Pure Brandy of 750 ml. each, 37 bottles of New Master Brandy of 750 ml each, 5 bottles of New Masters Brandy of 375 ml. each, 15 bottles of Delight Grape Brandy of 375 mls each, 60 bottles of Nansi Fine Brandy of 180ml, each 100 bottles of Sonia Pure Brandy of 180 ml. each and 49 bottles of Diamond Cup XXX Rum of 180 ml. each. Th articles were seized. None of them contained the sticker of KSBC. Samples were taken and they were sealed and labelled and the cardboard box and plastic bags were also labelled. The labels so affixed contained the signature of the accused and P.W.1. Ext.P2 search list was prepared and Ext.P3 mahazar was also drawn up. The seized autorickshaw, accused and the documents were produced before Vadakara

Excise Range Office.

3. P.W.5, on receipt of records, articles and the accused from P.W.1 registered crime as per Ext.P4 occurrence report. Property list, Ext.P5, according to P.W.5 was prepared by Assistant Excise Inspector Unnikrishnan Nair. P.W.5 claims that he had prepared Ext.P6 forwarding note and chemical analysis report is Ext.P7.

4. P.W.6 was the Investigating Officer. He took statements of witnesses, completed investigation and laid charge before court.

5. 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, 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 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.Os. 1 to 8 were got identified and marked. After the close of the prosecution evidence, the accused were questioned under Section 313 Cr.P.C. They denied all the incriminating circumstances brought out in evidence against them and maintained that they were innocent. Finding that the accused could not be acquitted under Section 232 Cr.P.C., they were asked to enter on their defence. They chose to adduce no evidence.

7. Relying on the evidence of P.Ws.1 and 4 and also the prompt production of the documents before court, the court below formed the opinion that the case against the accused has been established beyond reasonable doubt and

were convicted and sentenced as already mentioned. The said conviction and sentence are assailed in this appeal.

8. Assailing the conviction and sentence, learned counsel contended that P.W.1 had exercised power outside his jurisdiction and that vitiates the proceedings. For the above proposition, learned counsel relied on the decision reported in *Hamsa Koya v. State of Kerala* (2015(2) KHC 206). It is pointed out by the learned counsel that the date of occurrence was 2.3.2002 and the thondi articles were produced before court on 14.3.2002. There is no explanation for the unusual delay in producing the articles nor the person who was in custody of the articles has been examined. Therefore, it is contended that there is no guarantee that the article produced before the court was the contraband article seized from the possession of the accused. If that be so, according to the learned counsel, the court below was not justified in convicting the accused.

9. Learned Public Prosecutor on the other hand contended that even though there is delay, the evidence furnished by P.Ws. 1 and 4 are convincing enough and the court below has chosen to accept the same. The contemporaneous documents, namely, Exts. P1 and P2 also support the version given by the police officers. There is no suggestion to P.Ws. 1 and 4 that they have any reason to falsely implicate the accused. Therefore, even if there is some delay in producing the documents before court and the delay is not explained, that has not caused any prejudice to the accused and the accused have been found guilty. If the view taken by the court below is a possible, then there is no ground to interfere.

10. The first of the contentions based on the decision reported in *Hamsa Koya v. State of Kerala* (2015(2) KHC 206) has necessarily to fail. That was a case where the investigation was done by an incompetent officer and this

Court observed that investigation and filing of final report by Excise Officers outside the jurisdiction cannot be accepted.

11. In the case on hand, the facts noticed would show that the accused were coming in an autorickshaw and while they were passing through the check post, they were intercepted. The officers who detected the offence were manning the check post and it cannot be said that they have no jurisdiction to detect the offence when it passes through the check post and it comes to their knowledge. The principle laid down in the decision reported in Hamsa Koya v. State of Kerala (2015(2) KHC 206) has no application to the facts of this case.

12. It is true that P.W.1 says that he has no jurisdiction over the area. But it is different from saying that the officer in the check post is incompetent to check vehicles. He was one of the officers in the check post and in that capacity, he is fully entitled to check the vehicle as he deems

fit. Therefore, the fact that he was attached to some other range office does not mean that detection of the crime in this case and seizure of contraband article in the check post were without power or authority.

13. The second contention is very serious. Admittedly there is delay in producing the articles before court. It is seen from the records that the properties were produced before court only on 14.3.2002. P.W.1 says that on the date of the incident itself, the articles, the documents and the accused were produced before P.W.5. He registered crime on that basis. But he does not say that after having received the documents, articles etc. he kept custody of the articles. The evidence of P.W.6, the Investigating Officer, is totally silent in this regard. A reading of the evidence of P.W.5 would show that Unnikrishnan Nair was in custody of the articles. For reasons best known to the prosecution, the said Unnikrishnan Nair was neither cited as a witness nor

examined. If he was in custody of the articles as claimed by the prosecution, it is for him to establish that fact. The delay in producing the article before court is detrimental to the prosecution. It is only necessary to mention here the decision reported in Ramankutty v. Excise Inspector, Chelannur Range (2013 (3) KHC 308). Apart from the unexplained delay, there is also no evidence in this case as to who was in custody of the article till its production before court.

14. The court below appears to have omitted to note these significant and important aspect. When it is found that there is delay, none bothered to offer any explanation for the delay. This Court is not forgetting the fact that the accused were produced before the court promptly. But that cannot be a substitute for the reasons to be given for the delay in producing the property before court. In the light of the above facts, it is difficult to uphold the conviction and sentence.

For the above reasons, this appeal is allowed, the conviction and sentence passed by the trial court are set aside and it is held that the prosecution has not succeeded in proving the guilt of the accused beyond reasonable doubt. The accused are acquitted of the charges levelled against them. Their bail bonds shall stand cancelled and they are set at liberty.

P. BHAVADASAN,
JUDGE

sb.