

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 18TH DAY OF DECEMBER 2015/27TH AGRAHAYANA, 1937

CRL.A.No. 359 of 2006 ()

**AGAINST THE JUDGMENT IN SC 490/2004 of ADDITIONAL DISTRICT & SESSIONS
COURT, FAST TRACK (ADHOC-I), KOZHIKODE**

APPELLANT(S)/ACCUSED::

**KUNHIKANNAN, S/O. KANARAN,
EDACHERY, VIA BADAARA, KOZHIKODE DISTRICT.**

**BY ADVS.SRI.P.VIJAYA BHANU (SR.)
SRI.P.M.RAFIQ**

RESPONDENT(S)/COMPLAINANT::

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

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 18-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 359 of 2006

Dated this the 18th day of December, 2015

J U D G M E N T

The accused was prosecuted for the offence punishable under Section 55(a) of the Abkari Act. He was found guilty. 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 simple imprisonment for a further period of six months.

2. The incident in this case is said to have occurred on 05.12.2001. At the relevant time, PW1 was working as the Preventive Officer of the Excise Range, Nadapuram. He along with his team of officers had gone on routine patrol duty. When they reached a place called Thuruthi, they happened to see the accused coming along the way holding a can. Feeling suspicious, he was stopped and the can was seized and its contents were examined. By taste and smell, the liquid was identified as arrack. Ext.P1 arrest memo was

drawn up and he was arrested. A sample has been taken in a bottle of 180ml capacity. It was sealed and labelled and the label contained the signatures of PW1 and the accused. Then he prepared Ext.P2 seizure mahazar. He returned to the Station along with the accused, contraband articles and the documents and registered crime as per Ext.P3 occurrence report. He prepared Ext.P4 property list. Ext.P5 is the forwarding note and he obtained Ext.P6 Chemical Analysis Report. PW4 took over investigation. He recorded statements of witnesses and after completing investigation, he laid charge before court.

3. The court before which the final report was laid, took cognizance of the offence and finding the offence to be exclusively triable by a Court of Sessions, committed the case to Sessions Court, Kozhikode under Section 209 of Cr.P.C. after following the necessary procedures. The said court made over the case to Additional District & Sessions Court, Fast Track (Adhoc-I), Kozhikode, for trial and disposal.

4. The latter court, on receipt of records and appearance of the accused before the said court, framed charge for the offence punishable under Section 55(a) of the Abkari Act.

5. To the charge the accused pleaded not guilty and claimed to be tried. The prosecution therefore had PWs 1 to 4 examined and had Exts.P1 to P6 marked. MO1 was got identified and marked.

6. After the close of 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.

7. Finding that he could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. He examined DW1 in his defence.

8. Accepting the evidence of PW1 and the contemporaneous document, namely, Ext.P2 and also the Chemical Analysis Report, the court below came to the

conclusion that the offence has been made out. Conviction and sentence followed.

9. The main contention taken in this appeal is that the property list produced before the court below does not indicate that the balance quantity of arrack, after taking the sample, has been sealed, though PW1 claims to have done so. In the absence of any narration in the property list, it cannot be presumed that there was seal on the balance contraband article. If that be so, there is no guarantee that contraband produced before the court is the one seized from the possession of the accused.

10. The learned Public Prosecutor on the other hand pointed out that there is no merit in the above contention. It is evident from Ext.P1 mahazar that the sample as well as the balance quantity was also sealed. All steps have been properly taken and the court below has found the evidence to be sufficient enough to warrant a conviction. In this circumstance, no interference is called for.

11. After having heard the learned counsel for the appellant and the learned Public Prosecutor and after having perused the records, the learned Public Prosecutor seems to be fully justified in her submission.

12. The detection of the offence and the seizure of contraband articles are confined to the testimony of PWs 1 and 2. They speak about the detection of the offence, the seizure and sealing of the sample as well as the balance contraband article. Even though they were cross examined at length, nothing could be brought out in their evidence to show that they are speaking falsehood and their evidence stands unimpeached.

13. The recital in Ext.P1, a contemporaneous document gives in detail of what had transpired at the spot. In the property list produced before court, it is not shown that the balance contraband article has been sealed and that is highlighted as a ground to interfere in the appeal.

14. Ext.P2 mahazar is very clear on that aspect and it will be extremely hazardous to venture a finding solely on the basis of entries in that document. Both the property list and the occurrence report contained the narration that the balance article has been produced before court, even though they do not say that it was sealed. One must remember that the witnesses were being examined after a long period and it will be imprudent on the part of the court to insist for mathematical precision or for a photographic memory.

15. As already noticed, the evidence of PWs 1 and 2 conclusively show that the accused was in possession of the contraband article. If that be so, the conviction has only to stand.

16. Faced with the above situation, the learned counsel appearing for the appellant contended that the sentence imposed is too harsh and is disproportionate to the offence and passage of time may also have some relevance in this context. It is pointed out by the learned counsel that

several changes might have taken place and it will be too harsh to confirm the sentence which was imposed by the court below. Therefore, it was prayed that some leniency be shown in this regard.

17. After having heard the learned counsel for the appellant and the learned Public Prosecutor and after having given anxious consideration to various aspects, the learned counsel for the appellant seems to be justified in his submission that the sentence is too harsh especially, in this advanced stage of age. But at the same time, gravity of the offence cannot be also overlooked. Considering the various aspects, some leniency can be shown with regard to the sentence.

18. The accused had already undergone pretrial detention nearly 15 days. In the interest of justice and considering the passage of time, it is felt that the sentence can be confined to that period.

In the result, while confirming the conviction of the accused for the offence under Section 55(a) of the Abkari Act, the sentence imposed is set aside and the sentence of imprisonment stands confined to the period of pre-trial detention already undergone by the accused and the accused is sentenced to pay a fine of ₹1 lakh in default of payment of which he shall suffer simple imprisonment for a period of 15 days.

Sd/-
P.BHAVADASAN
JUDGE

ds

//True copy//

P.A. to Judge