

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 13TH DAY OF NOVEMBER 2015/22ND KARTHIKA, 1937

CRL.A.No.367 of 2006

AGAINST THE JUDGMENT IN SC 454/2003 of ADDL. SESSIONS COURT
(ADHOC)-I, KALPETTA DATED 31.01.2006

APPELLANT/ACCUSED:

RAJENDRAN, S/O.VISWANATHAN,
THARAYIL VEEDU, THOMATTUCHAL AMSOM, SULTHAN BATHERY,
WAYANADU DISTRICT.

BY ADV. SRI.LALGI P.THOMAS

RESPONDENT/COMPLAINANT:

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

BY SMT. S. HYMA, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
13-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 367 of 2006

Dated this the 13th 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. He was 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. Set off as per law was allowed.

2. The incident in this case occurred on 3.12.2000. On that day, P.W.8, the Sub Inspector of Police, Ambalavayal Police Station along with police party set out on patrol duty as usual. When they reached the tea plantation at Thomattuchal, they happened to get reliable information that a person was indulged in sale of illicit liquor. P.W.8 and his team proceeded to that place. A short distance away from that place, they

happened to see a person standing by the side of the road with a black can and a bottle. He was intercepted and details were asked. He disclosed his name and when asked what was in the can, he replied that it was country made liquor. The article was seized and by taste and smell, it was revealed that it was arrack. The can had a capacity of 2 litres and it contained 1 ½ litres of arrack. Out of the said quantity, 180 ml each was taken in two bottles as sample and those sample bottles and the can were sealed and labelled. The label contained the signatures of the accused, P.W.8 and the witnesses. Ext.P3 is the mahazar prepared by the officer concerned. Ext.P4 is the arrest memo. P.W.8 returned to the station and registered Crime No. 253 of 2000 as per Ext.P5 FIR. On the next day, he had the accused and the documents produced before the court. He would say that he kept the contraband article in his custody. Since there was much law

and order problem with regard to the Babri Masjid day, P.W.8 points out that, he was unable to produce the contraband article before the court forthwith and he could produce it only on 7.12.2000. Forwarding note sent by him is Ext.P7.

3. P.W.4 took over investigation. He went to the place of occurrence and prepared Ext.P1 mahazar. He recorded statements of a few witnesses and the subsequent investigation was done by the Sub Inspector of Police, Ambalavayal Police Station. P.W.5 obtained chemical analysis report, completed investigation and laid charge before court.

4. The court, before which final report was laid, took cognizance of the offence. Finding that the offence is one exclusively triable by a court of Sessions, the said court committed the case to Sessions Court, Kalpetta which made over the case to Additional District and Sessions Court (Adhoc)-I, Kalpetta for trial and disposal.

5. 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 which the accused pleaded not guilty and claimed to be tried. The prosecution therefore had P.Ws.1 to 8 examined and had Exts.P1 to P7 marked. M.Os. 1 and 2 were got identified and marked. After the close of the prosecution evidence, the accused was questioned under Section 313 Cr.P.C. wherein 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.

6. Probably impressed by the evidence of P.Ws. 1 and 8, also the contemporaneous document and the mahazar prepared by the officer concerned, namely, Ext.P3, and also

the fact that the accused and the documents were promptly produced before court, the court below came to the conclusion that the prosecution has succeeded in establishing the case against the accused and found him guilty. Conviction and sentence as already mentioned followed.

7. Assailing the conviction and sentence, learned counsel appearing for the appellant contended that detection of the offence was on 3.12.2000, whereas the contraband articles seized from the possession of the accused and the sample were produced before court only on 7.12.2000. Learned counsel pointed out that the statute mandates that the thondi articles seized should be produced forthwith and that means, almost immediately, and failure to do so is fatal to the prosecution. For the above proposition, learned counsel relied on the decisions reported in Appukuttan v. State of Kerla (2013 (2) K.L.T. SN 109) and Lakshmy v. State of Kerala

(2012(4) K.L.T. SN 93). Learned counsel went on to point out that a similar situation has been considered in those cases and it was held that unexplained delay is fatal to the prosecution case. In this case, the reason offered by P.W.8 is totally unacceptable. Thus, it is contended that the accused is entitled to an acquittal.

8. Learned Public Prosecutor on the other hand opposed the contention raised by the learned counsel for the appellant and contended that there is no merit in any one of them. Evidence of P.Ws. 1 and 8 are clear, cogent and convincing and they suffer from no infirmities. There is no inconsistency or contradiction in their evidence. It is clear that the contraband article was seized from the possession of the accused.

9. It is further pointed out that the prompt production of the article before court also lends credence to

the prosecution case. Learned Public Prosecutor contended that at any rate, the lower court elaborately considered the evidence on record and has come to the conclusion that the offence is made out. There is no justifiable reason as to why this Court should interfere.

10. After having heard learned counsel appearing for the appellant and the learned Public Prosecutor and after having perused the records, there seems to be considerable force in the submission made by the learned Public Prosecutor.

11. True, the evidence regarding detection, seizure, sampling etc remained confined to the testimony of P.Ws. 1 and 8. The prosecution case is that under the leadership of P.W.8 patrolling duty was being done on the date of incident done. P.W.8 narrates in detail as to how they happened to reach the place and nab the accused. He also

says about having collected sample and also prepared Ext.P3 mahazar.

12. P.W.8 on the above aspect gets sufficient corroboration at the hands of P.W.1 who had accompanied P.W.8 for detection. Even though P.Ws. 1 and 8 were cross-examined at length, their evidence could not be shaken.

13. Further, as rightly pointed out by the learned Public Prosecutor, Ext.P3, the seizure mahazar, contains the entire details of what had transpired at the place of occurrence and that the accused and the documents were produced before court on 4.12.2000 itself.

14. It is true that the detection of the offence was on 3.12.2000. But the thondi articles, the sample taken and the balance quantity were produced before court only on 4.12.2000. In the decision reported in Appukuttan v. State of Kerla (2013 (2) K.L.T. SN 109) it was held as follows:

“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 requisitioning the service of an expert through the instrumentality of the Court. The production of the property before the court without unreasonable delay is also a necessary requirement of law. The delay in producing the property before the court, by itself cannot be fatal to the prosecution, if the delay can be satisfactorily explained. The production of the property before Court (wherever it is practicable) should also take place without unnecessary. There should be explanation for the delay when there is delayed production of the property.”

15. In the decision reported in Lakshmy v. State of Kerala (2012(4) K.L.T. SN 93) it was held as follows:

“I would like to point out a recurring defect in the prosecution of abkari offences, which is solely due to

either negligence or deliberate inaction on the part of the excise officials. It is disconcerting to note that in many cases coming up before this Court, it is found that there is considerable delay by the Excise Officers in producing the contraband and samples before the Magistrate as enjoined under law, which legal position has been explained by this Court again and again. As a result, many accused who were liable to be convicted escape without any punishment solely due to the inaction of the excise officials. This Court tends to believe that probably the same is deliberate with the intention to provide a chance for acquittal to the accused. This case is a classic example for the same. There was delay of 14 days, despite which the officer who seized the contraband did not even try to explain the delay. If this trend continues, this Court will be forced to direct the Government to initiate disciplinary proceedings against the officers concerned for their lapse in conducting the seizure and prosecution in accordance with law established. The Public Prosecutor shall see that all the Excise Officers of this State are promptly informed about the same.”

16. It is no doubt true that the detecting officer is obliged in law to produce the thondi articles at the earliest and even a day's delay is fatal and there is an obligation on the part of the officer concerned to explain the delay. The word used is 'forthwith' and it has come up for consideration before the Division Bench and the Division Bench had held that what is meant by 'forthwith' is the seizure of the property should be reported to the Court immediately. But that does not mean that the article can be produced after a long period. Delay of more than a day in producing the article has to be properly explained.

17. In the case on hand, P.W.8, the detecting officer has pointed out that he was engaged in law and order in relation to Babri Masjid day which falls on 6th of December every year. He had taken care to submit before court that from the moment the articles were seized till they were

delivered to the court, it was in his custody. It is worth remembering that the narration in Ext.P1 was that the sample taken and the contraband article were sealed and labelled in the presence of the accused. This aspect of the case spoken to by P.W.8 is not seen challenged in cross-examination. So the claim made by P.W.8 that there is proper sealing and labelling of the sample and the balance contraband article at the time of detection is beyond dispute.

18. There is no reason as to why this Court should reject the explanation for the delay in producing the articles seized before court. The explanation offered seems to be reasonable, while one could say that he could have sent it through somebody. If P.W.8 was not prepared to take the risk of sending somebody else, he could not be found fault with.

19. Apart from the above fact, there is not even a suggestion to P.Ws. 1 and 8 that they had ill-motive to falsely

implicate the accused. In the absence of any such plea, it cannot be said that the act was without bonafides.

20. It was the above facts and circumstances which led the court below to come to the conclusion that the offence has been made out. At any rate, the view taken by the lower court is a possible one and unless it is shown that the finding is perverse, interference is not called for. Therefore, conviction has only to stand.

21. One aspect needs to be noticed in this regard. The charge is under Section 55(a) of the Abkari Act which on the facts of the case cannot be attracted because possession mentioned in Section 55(a) must relate to export or import and in this case, the prosecution did not have such a case. It is seen that the act falls within the ambit of Section 8(1) and (2) of the Act.

22. Faced with the above situation, learned counsel appearing for the appellant contended that the sentence imposed is too harsh and disproportionate to the offence and it is not warranted and justified in the facts and circumstances of the case. Taking the quantity seized into consideration and the present age of the accused and the long passage of time, it is felt that a lenient view needs to be taken in this regard. Learned counsel pointed out that things might have taken usual course and long passage of time may cause injury to the family of the appellant.

23. While it must be said that there is some force in the above submission, it is well settled that sentence has to be proportionate to the offence. The quantity seized in the case on hand is only 1 ½ litres. There is no case for the prosecution that the accused had indulged in such nefarious activities previously or in other words, there is no criminal

antecedent against the accused. In the light of these circumstances, it is necessary to provide an opportunity to the appellant to reform himself. Considering the above circumstances, it is felt that the sentence needs to be interfered with.

In the result, while confirming the conviction of the accused for the offence under Section 8(1) and (2) of the Abkari Act, the sentence imposed is set aside and instead he is sentenced to undergo simple imprisonment for one month and to pay fine of Rs.1,00,000/–, in default of which to suffer simple imprisonment for a period of 15 days. Set off as per law will be allowed.

P. BHAVADASAN,
JUDGE

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