

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. 374 of 2006 ()

**AGAINST THE JUDGMENT IN SC 136/2004 of ADDITIONAL SESSIONS COURT
(ADHOC)-II, THODUPUZHA**

CP 84/2002 OF JUDICIAL FIRST CLASS MAGISTRATE NEDUMKANDOM

APPELLANT(S)/ACCUSED::

**BIJU, S/O. JOSE,
KOCHUVEEDU, CHEMMANNAR KARA, KANTHIPPARA VILLAGE.**

BY ADV. SRI.S.RAJEEV

RESPONDENT(S)/COMPLAINANT::

**STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR
HIGH COURT OF KERALA. (CRIME NO.421/01 OF
SANTHANPARA).**

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE

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

ds

P.BHAVADASAN, J.

Crl.A. No. 374 of 2006

Dated this the 27th day of November, 2015

J U D G M E N T

The accused in this case was prosecuted for the offences punishable under Sections 55(a) and 8(2) of the Kerala Abkari Act. He was found guilty. He was therefore convicted and sentenced to undergo rigorous imprisonment for one year and to pay a fine of ₹1 lakh with a default clause of rigorous imprisonment for a further period of three months for the offence under Section 8(2) of the Abkari Act. No separate sentence was imposed for Section 55(a) of the Act.

2. The incident which gave rise to this criminal proceedings against the accused occurred on 18.12.2001. PW5, Who was the Sub Inspector of Police at Santhanpara while was on patrol duty along with other officers, when they reached Chemmannar, they got reliable information that illicit liquor is being sold near a toddy shop. They proceeded

to the spot and halted the jeep a little away from the place of occurrence. As they walked by the side of the canal, they happened to locate the accused holding a black can having a capacity of 2½ litres and on the other hand holding a glass. Seeing the Police Officers, he tried to hide himself. He was apprehended and the can in his possession was seized. It was found to contain about 2 litres of liquid. By smell and taste, it was identified as arrack. They were also able to recover ₹660/- from his pocket. The accused was arrested and Ext.P1 mahazar was prepared. PW5 took two samples of 180ml each in two bottles and had them sealed and labelled. The labels contained the signatures of the accused, witnesses and PW5. PW5 along with officers and the accused and the contraband articles and the documents prepared on the spot returned to the Station and registered Crime No.421/2001 as per Ext.P4 FIR. He prepared Ext.P5 property list and had the articles produced before court on 09.01.2002. Investigation was conducted by PW4. He

prepared Ext.P2 forwarding note and obtained Ext.P3 Chemical Analysis Report. He recorded statements of witnesses and the charge was finally laid by PW4.

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, Thodupuzha under Section 209 of Cr.P.C. after following the necessary procedures. The said court made over the case to Additional Sessions Court, (Adhoc)-II, Thodupuzha, for trial and disposal.

4. The latter court, on receipt of records and appearance of the accused before the said court, framed charges for the offences punishable under Sections 55(a) and 8(2) 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 5 examined and had Exts.P1 to P6 marked. MOs 1 to 3 were 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. He further added that against the sale of illicit liquor in Chemmannar toddy shop, the DY.F.I. sympathizers had objected and conducted a protest. That was led by the accused herein. When they reported to the Police Station, they were assured that appropriate steps would be taken. Two days thereafter, he says that with the connivance of the Sub Inspector of Police PW5, the contractor of the toddy shop had him implicated. He claimed to be 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.

8. The court below presumably impressed by the evidence of PWs 3 and 5 and also influenced by the fact that the contemporaneous document namely, Ext.P1 mahazar

gave the complete details regarding the incident, along with the fact that the accused was promptly produced before court, felt that the prosecution had established its case beyond reasonable doubt and found the accused guilty. Conviction and sentence followed.

9. The learned counsel appearing for the appellant assails the conviction and sentence on several grounds. It was pointed out by the learned counsel that two samples were admittedly taken by PW5 as would be clear from his evidence as well as Ext.P1 mahazar. However, when one of the samples was produced in court, it turned out to be of some other case. Strangely enough, according to the learned counsel, behind the back of the accused, another sample was produced which is received by court and the court is satisfied that that is the proper sample and then goes on to convict the accused without even giving him an opportunity to verify whether the sample that was subsequently produced is the sample taken from the

contraband article alleged to have been seized from the possession of the accused. In other words, the contention is that the accused had no opportunity of seeing the sample even or to verify the same, if it was taken from the contraband alleged to have been seized by him. This according to the learned counsel, is unknown in law and conviction on that basis cannot be sustained. It affects the natural rights of the accused. It was then pointed out that though the detection was on 18.12.2001, the contraband articles and the samples were produced only on 09.01.2002 as could be seen from Ext.P5 property list. The explanation offered by PW5, the Sub Inspector of Police the Detecting Officer is that he waited for the Circle Inspector, the Investigating Officer to come from Sabarimala duty and let him see the contraband articles. The learned counsel brought to the notice of this Court the evidence of PW4. PW4 the Investigating Officer, who is the CI entered investigation on 30.12.2001. Obviously he must have seen

the contraband articles on that day. He need not have to wait till he returned from Sabarimala duty to see the articles. The reason given for the delay is obviously false. If that be so, the learned counsel pointed out that there is no proper explanation for the delay and the claim of PW5 that he had the safe custody of the same cannot be believed. These vital aspects have been conveniently omitted by the court below to be noticed and that has resulted in wrong conviction being entered into. Accordingly, it is contended that the conviction and sentence cannot stand.

10. The learned Public Prosecutor on the hand tried to sustain the conviction. It is pointed out by the learned Public Prosecutor that the evidence of PWs 3 and 5, which is consistent, cogent and convincing enough, give a uniform version of the incident and there is no reason to suspect their evidence. Even though the accused has a case that he has been falsely implicated, there is hardly any evidence regarding the same. The evidence of DW1 cannot improve

the state of affairs as far as the accused is concerned. Further, it was contended that the seal on the sample sent for chemical analysis tallied with the sample seal and that is sufficient in law. The lower court found the evidence of PWs 3 and 5 to be convincing enough and there is no reason to take a different view. Merely because there is some error committed by the court below in receiving the sample cannot be said that the conviction is vitiated and it is also pointed out that proper explanation has been offered for the delay.

11. Taking the second contention regarding delay first for discussion, one may at once refer to the decision reported in **Ramankutty v. Excise Inspector, Chelannur Range** (2013 (3) KHC 308) wherein, it was held that unexplained delay in producing the contraband before the court after seizure is fatal to prosecution case.

12. True, this Court is not unaware of the fact that the Division Bench of this Court held that the word 'forthwith'

does not mean immediately but, within a reasonable time. There also, the Bench was cautious enough to mention that the delay, if any, should be properly explained. The Division Bench only cautioned that merely because a few days delay occurs, the prosecution case cannot be thrown out. But it did not hold that no explanation need to be offered.

13. In the decision referred to above even a day's delay was held to be fatal unless properly explained.

14. Bearing the above decision in mind, an examination now be made with regard to the facts of this case. Admittedly, the detection was on 18.12.2001 and as going by the evidence of PW5 and also Ext.P6, the articles were produced only on 09.01.2002. That is almost the delay of 22 days. The explanation offered by PW5 is that he wanted the Investigating Officer to see the contraband articles and then only he wanted to produce it before court. On the face of it, the explanation may look attractive. But gets exploded when we look at the evidence of PW4, who is

the Investigating Officer. The Investigating Officer started investigation of the case on 30.12.2001. He had prepared the forwarding note and sent it to court, which obviously means he must have seen the articles and the samples on 30.12.2001. If that be so, the claim made by PW5 that he had waited till 09.01.2002 for PW4 to see the articles is patently false and the explanation offered cannot be accepted. There is no satisfactory reasonable explanation offered for the delay. In view of the false explanation offered, it is extremely doubtful whether he was in custody of the article also.

15. Apart from the above lacuna in the prosecution case, the act of the court too adds to the agony of the prosecution. When PW5 was in box, one of the samples, which he is alleged to have taken, was handed over to him to testify. It was also marked as MO4. In his enthusiasm, the learned Public Prosecutor had the sample opened and to the dismay of everyone, it was found that it did not belong

to the case in question, but it belonged to some other case. The learned Sessions Judge sought explanation from the concerned Judicial First Class Magistrate court who in turn sought explanation from PW5. One would have expected the prosecution if they had the proper sample to produce it again and recall the witness, examine him and mark it in accordance with law, giving an opportunity to the accused to controvert the claim of the prosecution. But surprisingly and shockingly enough, the learned Sessions Judge receives it privately and relies on that sample and convicts the accused. Something which is unheard of in law. Apart from the fact that it is not marked in accordance with law and marked sample is not the sample said to have been drawn by PW5, the elementary principle of natural justice too have been thrown to the winds. Again, an item of evidence which is not put to the accused when questioned under Section 313 Cr.P.C. and which forms the basis of conviction cannot be upheld.

For the above reasons, this Court is unable to sustain the conviction and sentence awarded by the court below. This appeal is allowed. The conviction and sentence passed by the court below are set aside and the accused stands acquitted of all charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

Sd/-
P.BHAVADASAN
JUDGE

ds

//True copy//

P.A. to Judge