

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 16TH DAY OF OCTOBER 2015/24TH ASWINA, 1937

CRL.A.No. 419 of 2006

AGAINST THE JUDGMENT IN SC 279/2000 of ADDL.SESIONS COURT
FAST TRACK (ADHOC)-IV, THIRUVANANTHAPURAM.

APPELLANT(S)/ACCUSED:

MOHAN, S/O.VELAYUDHAN,
MELEVILAKAM VEEDU, PULLAYIL DESOM,
KODUVAZHANOOR VILLAGE, CHIRAYINKEEZHU TALUK.

BY ADV. SRI.LIJU. M.P

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA, REPRESENTED BY THE
EXCISE INSPECTOR, CHIRAYINKEEZHU RANGE,
THIRUVANANTHAPURAM. REP. BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SMT. S. HYMA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
16-10-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 419 of 2006

Dated this the 16th day of October, 2015.

JUDGMENT

The accused was prosecuted for the offences punishable under Sections 8(1) and (2) of the Abkari Act and he was found guilty. Therefore he was convicted and sentenced to undergo rigorous imprisonment for two years 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 is said to have taken place on 13.12.1997. On that day, P.W.3, who was the Preventive Officer of Chirayinkeezh Excise Range, along with P.W.4 and others had gone on routine patrol duty. When they reached in front of the brick klin belonging to one Mrithunjayan, they happened to see a person coming along the road carrying a can. Seeing the excise officers, he tried to

run away from the place which was effectively prevented by them and the can was seized in the presence of independent witnesses. The can contained 8 litres of arrack. The accused was arrested and Ext.P1 mahazar was prepared. In Ext.P1 the signature of the accused, witnesses and P.W.4 were affixed. They then returned to the station and P.W.3 prepared the occurrence report, namely, Ext.P4. He had the accused and the articles seized produced before court. Investigation was done by P.W.5 who say that he was the Excise Inspector till 20.10.2000 and he has investigated the case. He claims to have recorded statements of witnesses and Ext. P5 is the chemical analysis report which was received by him. It is seen that the property list prepared by C.D.Sebastian was not marked at the time of trial of the case. Accused was arrested on 13.12.1997 and the articles were produced only on 18.12.1997. According to P.W.5 the article was in the custody of C.D.Sebastian. However, P.W.5 completed investigation and

laid charge before court.

3. 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, Thiruvananthapuram under Section 209 Cr.P.C. The said court made over the case to Additional Sessions Court Fast Track (Adhoc) No.IV, Thiruvananthapuram for trial and disposal.

4. 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 5 examined and had Exts.P1 to P5 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 her defence. He chose to adduce no evidence.

5. The court below, greatly impressed by the evidence of P.Ws. 3 and 4, also the contemporaneous document and the various steps taken by the excise officers and also prompt production of the accused before court gave credence to the prosecution case. Holding so, conviction and sentence as already mentioned followed.

6. Assailing the conviction and sentence, learned counsel for the appellant contended that the court below has omitted to consider a very significant question that arises for consideration in the case. It is pointed out that detection was on 13.12.1997, but the articles were produced before court only on 18.12.1997. According to the learned counsel, no explanation has been given for the delay. It is also pointed

out that no sample was taken by the officer and there is no evidence as to who had taken the sample and from where. Forwarding note is conspicuously absent and P.W.5, the investigating officer, is unable to shed any light on this aspect. Since there is no evidence regarding the sampling done, the chemical analysis report is of little significance and the accused cannot be mulcted with the liability. Learned counsel went on to point out that merely because P.Ws. 3 and 4 say about the detection and preparation of mahazar, that does not automatically follow that the offence is established. It is by now well settled that the property list, forwarding note and also sampling have relevance in proving the guilt of the accused. It is clear that in the case on hand these aspects have been omitted to be noticed by the court below.

7. Learned Public Prosecutor supported the judgment on various grounds. According to her, there is no suggestion to P.Ws. 3 and 4 that the accused had not been

arrested as alleged by the prosecution. Even in the absence of any forwarding note and property list, it is possible for the court to reach a conclusion that the offence has been made out. It is contended that the court below has found that the prosecution has succeeded in establishing the case beyond reasonable doubt and no interference is warranted.

8. If as a matter of fact, what is stated by P.W.3 is correct, there is no sampling done at the time of seizure. It has come out during the evidence of P.W.5 that initially the articles were in the custody of P.W.3 and later the articles were kept in the custody of C.D. Sebastian. But in cross examination, P.W.5 admitted that neither P.W.3 nor C.D. Sebastian had stated that they had custody of the articles.

9. It is true that oral testimony of P.Ws. 3 and 4 are consistent and uniform in giving a picture of what had transpired. The two independent witnesses turned hostile to the prosecution. The prosecution therefore had only the oral

evidence of P.Ws. 3 and 4. Their evidence is almost identical.

10. The property list does not appear to have been produced before the court below and that creates doubt as to what exactly had been produced before the court below concerned. No reason was also given for not producing the list of properties sent to court. The prosecution has also not produced the forwarding note and the evidence of P.W.5 is silent in this regard. P.W.5 would say that neither Sebastian nor P.W.4 had stated that they had custody of the articles. P.W.5 would say that the sample sent for chemical analysis was taken by Sebastian. However, these documents, mainly the forwarding note, are conspicuously absent in the case.

11. Coming to the sampling, it is not discernible from the records as to who had taken the sample and under what authority and from where the sample was taken.

12. Merely because two of the excise officers gave a parrot like version of the incident, that does not advance the

case of the prosecution. After all, thondi list, forwarding note and chemical analysis report are crucial documents. As per the principle laid down by this Court in various decisions, it has been held that unexplained delay in producing the articles before court is fatal to the prosecution case. When these principles are looked into, it is difficult to hold that the prosecution has succeeded in establishing the case against the accused. Except for the seizure of M.O.1, there is nothing to show that the accused is involved.

13. There is no evidence as to who had taken the sample and from where it was taken. No property list is prepared and is seen produced before court. Only the can was produced. Further, there is no copy of the forwarding note produced, which contains the sample seal. The result is that this Court is not in a position to hold that the sample analysed by the chemical analyst is the sample taken from the contraband seized from the possession of the accused.

14. It is by now well settled that it is absolutely necessary to examine the person who has drawn the sample after the properties were surrendered before court. There is no evidence in this regard at all. That tells upon the veracity of the prosecution case.

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 is acquitted of the charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

P. BHAVADASAN,
JUDGE

sb.