

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 28TH DAY OF SEPTEMBER 2015/6TH ASWINA, 1937

CRL.A.No.510 of 2006 C

AGAINST THE JUDGMENT IN SC 235/2004 of ADDITIONAL SESSIONS COURT
FAST TRACK - 1 (ADHOC), MANJERI DATED 27-02-2006

APPELLANT/ACCUSED:

KUNJIKUTTAN, S/O. MONAYIL CHATHA,
MALIYEKKAL, KALIKAVU, MALAPPURAM.

BY ADV. SRI.BABU S. NAIR

RESPONDENT/STATE:

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

BY SRI. C.K. JAYAKUMAR, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
28-09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.510 OF 2006

Dated this the 28th day of September, 2015.

J U D G M E N T

The accused was prosecuted for the offences punishable under Sections 55(a) and 8(1) of Abkari Act. He was found guilty of the offences alleged against him. He was therefore convicted and sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs.1 lakh with default clause of simple imprisonment for one year. Set off as per law was allowed.

2. The prosecution case is that on 16.09.1999 at about 4.30 p.m, while PW1, preventive officer attached to Kalikavu range, along with others were on patrol duty, they happened to locate the accused going along the road carrying a can. Seeing the excise officers, he tried to hide himself which caused suspicion in the mind of the officers. They intercepted him and in the presence of witnesses, can in his possession was seized. The can was having a capacity of 5 liters and it contained some kind of liquid. On examining the same, the preventive officer and

others were convinced that it is arrack. Sample was taken and the balance quantity was also sealed. Accused was arrested as per Ext.P1 arrest memo. Both the sample as well as the balance contraband articles were labeled with the signatures of the accused and the officer concerned. PW1 prepared Ext.P2 seizure mahazar in the place of occurrence. He returned to the office and entrusted the accused and the articles to the guard on duty. PW5, Excise Inspector, registered occurrence report as per Ext.P4. He prepared Ext.P5 property list and the forwarding note is Ext.P6. Accused and the articles were produced before court on 17.09.1999.

3. Investigation was done by PW6 who obtained Ext.P7 chemical analysis report. He recorded the statement of witnesses, completed investigation and laid charge before court.

4. The court before which charge was laid took cognizance of the offences and finding that the offences are exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Manjeri as per Section 209 Cr.P.C after following necessary procedures. The said court made over the case to

Additional Sessions Court Fast track -I (Ad hoc), Manjeri for trial and disposal. The latter court, on receipt of records and on appearance of the accused, framed charge for the offences already made mention of, to which, the accused pleaded not guilty and claimed to be tried.

5. The prosecution therefore had PWs 1 to 6 examined and Exts.P1 to P8 marked. M.O.1 was also got identified and marked.

6. After the close of the prosecution evidence, 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 his defence. He chose to adduce no evidence.

7. On appreciation of the materials before it, court below found the evidence of PWs 1 and 2 to be convincing enough supported by the contents of Ext.P2 and found no reason to doubt the prosecution version of the incident. Accordingly, accused was found guilty. Conviction and sentence as already mentioned followed.

8. Assailing the conviction and sentence, learned counsel appearing for the appellant pointed out that the accused was taken into custody on 16.09.1999 but he was produced before court only on 17.09.1999. There is no explanation for the delay and there is no evidence to show as to who has taken custody of the article and the accused till the custody was taken over by PW5. It will be hazardous in the present case to venture a finding of guilt based on the evidence of PWs 1 and 2 when the independent witnesses have turned hostile.

9. For the proposition that unexplained delay in production is fatal, learned counsel for the appellant relied on the decision in **Ramankutty vs. Excise Inspector, Chelannur Range** (2013 (3) KHC 308).

10. Learned Public Prosecutor, on the other hand, contended that there are no grounds to interfere with the conviction and sentence passed by the court below. The evidence of PWs 1 and 2 are consistent and uniform and there is nothing in their evidence to show that they had any reason to falsely implicate the accused. Their evidence is supported by a

contemporaneous document, Ext.P2 which narrates in detail what transpired at the place. It is significant to notice, according to the learned Public Prosecutor, that both the independent witnesses have admitted their signatures on Ext.P2 and the court below has chosen to believe the evidence furnished by PWs 1 and 2.

11. As regards the delay, learned Public Prosecutor pointed out that there is no delay at all since detection was at 4.30 p.m on 16.09.1999 and PW1 had stated that he handed over the accused and materials to the guard on duty on the same day itself and on the very next day PW5 received the accused and the articles and produced before court. According to the learned Public Prosecutor, the principle laid down in **Ramankutty vs. Excise Inspector, Chelannur Range** (2013 (3) KHC 308) can have no application to the present case and there is no reason to interfere with the findings of the court below.

12. It is necessary to refer to the evidence of PWs 1 and 2. PW1, who was the preventive officer, along with PW2 had gone for patrol duty on 16.09.1999 and when they reached before the

house of C.B. Kurikkal, they happened to see the accused coming along the road with a can in his hand. Seeing the excise officers, though accused tried to retreat, he was intercepted and the can in his hand was seized. On examination it was found to contain 1 liter of illicit arrack. Accused was arrested and Ext.P2 mahazar was prepared by PW1 on the spot. PW1 then says that he went to the office and handed over the accused to the guard on duty.

13. The evidence of PW2 is also consistent with that of PW1. Even though PWs 1 and 2 were cross examined at length, nothing is brought out in their cross examination to show that they had falsely implicated the accused.

14. It is true that independent witnesses denied of having seen the incident but admitted their signatures. PW1 has also identified the label contained on M.O.1 which is produced before court. It is not the law that evidence of police officers or excise officers cannot be trusted to find the accused guilty. Corroboration is only a rule of prudence and not a rule of law. If the evidence of police officers is found to be without blemish and if their evidence inspires confidence in the mind of court,

there is no restriction in reaching a conclusion based on their evidence. In the present case, PWs 1 and 2 have a uniform version regarding the incident. Any further corroboration of the testimony if required is furnished by Ext.P2 mahazar which is a contemporaneous document. Ext.P2 contains all the details. As rightly pointed out by the learned Public Prosecutor, both the independent witnesses denied of having seen the incident. But they admitted their signatures in Ext.P2. PW1 has stated that he had entrusted the article and the accused to the guard on duty on 16.09.1999 in the afternoon and PW5 has stated that he had received the accused and the articles on 17.09.1999.

15. It is true that there is some unexplained factors regarding the person who has taken custody of the article and the accused during the period after PW1 handed over them to the guard on duty till PW5 took over the same. In the decision in **Ramankutty vs. Excise Inspector, Chelannur Range** (2013 (3) KHC 308), the question of delay was considered. That was a case in which detection of the offence was on 24.05.1997 and the accused and the articles were produced on 26.05.1997. Since

there was no explanation for the inordinate delay, in the facts and circumstances of that case, this Court had held that unexplained delay in production is fatal. There is no universal principle laid down in the above decision. It is clear from the decision that each case depends upon its own facts.

16. It is significant to notice that PW5 was not cross examined at all in this regard. Had he been cross examined, he could have offered an explanation as to who had taken custody of the article and the accused till he received them. In the absence of even a suggestion to PW5 or PW1 to the contrary, it will be taken that they have performed their duties in accordance with law.

17. It is not in dispute that the articles and the accused were produced in court on 17.09.1999, i.e. the next day of detection of offence. The lower court has appreciated the evidence in considerable detail and has come to the conclusion that the evidence is sufficient to hold that the contraband article was seized from the possession of the accused. No factual or legal error could be pointed out in the finding of the court below.

Therefore, the finding of the court below that the accused is guilty has necessarily to stand.

18. Learned counsel appearing for the appellant then contended that considering the quantity of contraband articles seized and the age of the accused, sentence imposed is very harsh and is not proportionate to the offence committed by the accused. There is no previous history of accused having indulged in any such nefarious activities and he should be given an opportunity to mend his ways. Three years of imprisonment may have adverse effect on him.

19. After having given anxious consideration to the above submission, it is felt that there is some substance in the plea made by the learned counsel for the appellant. Quantity seized is only 1 liter. Sentence of three years imprisonment is indeed too harsh and as rightly pointed out by the learned counsel for the appellant, it is disproportionate to the offence committed by the accused. Leniency is certainly warranted.

20. By no stretch of imagination, offence under Section 55(a) of Abkari Act can be attracted to the facts of the

case. Conviction can be sustained only under Section 8(1) of Abkari Act.

While confirming the conviction for the offence punishable under Section 8(1) of Abkari Act, the sentence imposed by the court below is set aside and the accused is sentenced to undergo rigorous imprisonment for six months and to pay a fine of Rs.1 lakh in default of payment of which to suffer simple imprisonment for one month. Set off as per law is allowed.

Sd/-

**P.BHAVADASAN
JUDGE**

smp

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P.A to Judge