

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 6TH DAY OF NOVEMBER 2015/15TH KARTHIKA, 1937

CRL.A.No. 73 of 2009 ()

**AGAINST THE ORDER/JUDGMENT IN SC 295/2008 of ADDITIONAL SESSIONS COURT
FAST TRACK -II, PALAKKAD DATED 12-12-2008**

APPELLANT(S)/ACCUSED:

**VENUGOPAL, AGED 36 YEARS
S/O.DAMODARAN, MATTUMMAL VEEDU, KURUVATTU DESOM
VELLINEZHI, OTTAPPALAM TALUK.**

**BY ADVS.SRI.D.ANIL KUMAR
SRI.P.JAYARAM**

RESPONDENT(S)/COMPLAINANT:

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

BY PUBLIC PROSECUTOR SMT. S. HYMA

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 06-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 73 of 2009

Dated this the 06th day of November, 2015

J U D G M E N T

The accused in this case was prosecuted for the offence punishable under Section 8(1) and (2) of the Abkari Act. He was found guilty. He was therefore convicted and sentenced to suffer rigorous imprisonment for one year and to pay a fine of ₹1 lakh in default of payment of which he is to suffer simple imprisonment for three months. Set off as per law was allowed.

2. The incident in this case occurred on 23.05.2007. On that day, PW1, the Excise Inspector attached to Cherpulassery Excise Range along with his team of officers had gone on for duty. When they reached the road lying north-west at Kulakkad, they happened to see the accused coming along the road with a can. Seeing the Excise vehicle, he tried to escape. He was effectively intercepted and the can with him was seized. The can was found to

contain full of liquid. By taste and smell, it was identified as arrack. Arrest memo was prepared and the accused was arrested. PW1 took 300 ml of sample in a bottle having a capacity of 375 ml and on the sample bottle as well as on the balance article, seal and label were affixed. PW1 affixed his personal seal 'KSN' on them. Ext.P1 mahazar was prepared and the arrest memo is Ext.P2. Thereafter, PW1 with his officers along with the accused, contraband article and the records returned to the station and as per Ext.P4 registered Crime No. 5/07. Ext.P5 property list was prepared and Ext.P6 forwarding note was given to the court. Report so received is Ext.P10. PW5 took over investigation. He visited the place of occurrence, recorded statement of witnesses and laid final report 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, Palakkad under Section 209 of

Cr.P.C. after following the necessary procedures. The said court made over the case to Additional Sessions Court, Fast Track-II, Palakkad, 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 8(1) and (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 P10 marked. MO 1 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. He also added that on the date of incident, in the afternoon, the Excise Officials came to the place. They came in front of a tea shop. Then a person by name Padmanabhan

approached the Excise Officers and pointed on such a place and a can was retrieved from there. He further stated that the Excise Officials along with the said Padmanabhan came to his house. The accused, who claims to have come home for lunch, was illegally arrested. He says that this was all done at the connivance of Padmanabhan. The accused also would say that he informed the authorities concerned about the questionable act done by Padmanabhan and therefore, Padmanabhan had an axe to grind against him.

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

8. The court below, on an appreciation of the evidence in the case, found the prosecution case established through the evidence of PWs 1 and 2 and Ext.P1 and P10. Consequently, the accused was convicted and sentenced as already mentioned.

9. Assailing the conviction, the learned counsel appearing for the appellant contended that two seals have been used and that indicate that there was no definiteness about the seal used by the officers. If that be so, it is contended that one cannot be sure about the articles sent for chemical analysis. Attention was drawn to the evidence of PW2 to the effect that labels now found i.e., at the time of examination, found on the various articles seen not in form. One must remember here that the incident took place in 2007 and 9 years have elapsed since then. It is also pointed out that the evidence adduced by the defence namely, in the form of DW1 and also the testimony of PWs 3 and 4 would clearly show that the defence set up by the accused that he was arrested from his house and the can was planted with the aid of Padmanabhan, cannot be ruled out as absurd. Attention was drawn to the fact that PWs 3 and 4 admitted that they had affixed their signatures in the document concerned from the house of the accused. This

fortifies the defence set up. The learned counsel complained that it is well settled that the burden of proof on the accused is not so onerous as that on the prosecution and it is enough that if he creates a doubt in the mind of court, we get the benefit of acquittal. The learned counsel went on to point out that on a proper appreciation of the evidence in the case, it can be seen that case has not been proved.

10. The learned Public Prosecutor contended that the evidence of PWs 1 and 2 is without blemish and there is no reason not to reject their evidence. It is true that PWs 3 and 4 did not support the prosecution case. But they admit their signatures on their respective documents though they contended that they had not seen the actual seizure.

11. Ext.P1, the mahazar prepared by PW1 bears testimony on the effect that the incident as alleged has occurred. It contains the entire details and there is nothing to show that there was any fabrication. Moreover, the prompt production of the accused and the properties before

court goes a long way in establishing the prosecution case. The contention is that no grounds are made out to interfere with the judgment of the court below.

12. After having heard the learned counsel for the appellant and the learned Public Prosecutor and after having perused the records, it is felt that the learned Public Prosecutor may be right in her submission that there is hardly anything to interfere with.

13. That on 23.05.2007, the accused was apprehended is a fact spoken to by PWs 1 and 2. Even though PWs 3 and 4 turned hostile, they admit their signatures in the document PWs 1 and 2 narrate the story of how the accused happened to be apprehended and the rest of the matters. The fact that the accused, the documents and the materials were promptly produced before court further guarantees the prosecution case. Therefore, it is contended that there were two seals found on the bundles, one of the court also. Normally, the seal of the court is not

used but, if by inadvertent mistake the seal of the court is used, it does not mean that the entire case has to be thrown out. As long as the seal used by the Police Officer, who took the sample, is available in court, there is no reason to hold that the seal used is not the one as contemplated under the Act. Further, the sample of the seal is given in the mahazar itself.

14. Both PWs 1 and 2 do say about the sampling and labelling. On these aspects, there is no serious cross examination. The attempt was to show that it was at the behest of one Padmanabhan that the accused was apprehended. It was in that pursuit, that PWs 3 and 4 were cross examined and DW1 was examined.

15. In the case on hand, the forwarding note does contain the specimen seal and from Ext.P10, Chemical Analysis Report, it is very clear that the seal found on the sample and the specimen seal said to have been sent for comparison compared well.

16. The immediate drawing up of Ext.P1 and the prompt production of the accused before the court rules out any possible fabrication or manipulation.

17. Coming to the defence set up by the accused, he relies on the testimony of PWs 3 and 4 and DW1. PWs 3 and 4 have stated that they had signed from the house of the accused and DW1 has stated that he also happened to see the arrest of the accused from his house. But a reading of the evidence of PWs 3 and 4 as a whole along with the statement given in 313 by the accused and the evidence of DW1, it becomes difficult to reconcile them. They are mutual contradictory statements.

18. Probably, the evidence of PWs 1 and 2 might have impressed the court below so much that it need not find it necessary to labour much. It has already been noticed that the evidence of PWs 1 and 2 do speak about the detection etc.. There is nothing to show that PWs 1 and 2 had any axe to grind against the accused that they were act at the

behest of anybody else. The court below was therefore perfectly justified in coming to the conclusion that the offence has been made out. The conviction has only to stand.

19. Faced with the above situation, the learned counsel for the appellant pointed out that the sentence imposed is on a very high side and it is not warranted by the quantity seized and the nature of the offence and also the passage of time.

20. There may be some force in the above contention. The quantity seized was only 5 litres and almost 9 years have elapsed. There is nothing to show that the accused was engaged in any other nefarious activities. At any rate, there is nothing to show that he was regularly vending in liquor. It is only proper that a lenient view be taken regarding the sentence.

Thus, while confirming the conviction of the accused for the offence punishable under Section 8(1) and (2) of the

Abkari Act, the sentence imposed by the court below is set aside and instead, he is directed to undergo rigorous imprisonment for a period of three months and to pay a fine of ₹ 1 lakh, in default of payment of which, he shall suffer simple imprisonment for a period of one month. Set off as per law will be allowed.

Sd/-
P.BHAVADASAN
JUDGE

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P.A. to Judge