

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 8TH DAY OF OCTOBER 2015/16TH ASWINA, 1937

CRL.A.No. 522 of 2006

AGAINST THE JUDGMENT IN SC 259/2005 of ADDL. COURT
(ADHOC)-I, KOTTAYAM.

APPELLANT(S)/ACCUSED:

THOMAS ANTONY, S/O.ANTONY,
PUNNAIKAT HOUSE, AZHUTHAMUNNI KARA
ERUMELY SOUTH VILLAGE.

BY ADV. SRI.ARUN VALENCERY

RESPONDENT(S)/COMPLAINANT:

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

BY PUBLIC PROSECUTOR SRI. C.K. JAYAKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
08-10-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 522 of 2006

Dated this the 8th day of October, 2015.

JUDGMENT

The accused was prosecuted for the offence punishable under Section 55(g) of the Abkari Act. He was found guilty and 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 six months. Set off as per law was allowed.

2. P.W.1 was the Preventive Officer of Kanjirappally Excise Range Office as on 21.10.2003. On that day, at 3.30 p.m. he was on patrol duty and when he reached Mukkampetty bridge, he received reliable information that one Thomas was selling illicit liquor in his house. He prepared search memo and sent to court and then proceeded to the place where illicit activity was going on. The accused was seen standing in the courtyard of the house. Seeing Excise Officers,

he ran away, though P.W.1 followed the accused, he could not be apprehended. His house was searched and nothing could be recovered from the house. The compound was searched and about 25 feet behind the house, they were able to recover cans covered by leaves. They were able to detect five jars each having 35 litres capacity and three jars, each having the capacity of 22 litres. P.W.1 opened all the cans and found that it contained wash used for preparation of arrack. He took 500 ml from each of the cans in bottles having the capacity of 750 ml as sample. The samples were sealed and labelled containing the signature of the witnesses and P.W.1. Balance quantity was destroyed at the place. The cans seized were also affixed with the labels containing the signature of the witnesses and P.W.1. He prepared Ext.P2 mahazar and search memo is Ext.P1. The search list of the house is marked as Ext.P3. He returned to the office and prepared Ext.P4 occurrence report. Along with the forwarding note, he

produced the articles before the court. The chemical analysis report is Ext.P5.

3. Investigation was done by P.W.5. He prepared Ext.P9 scene mahazar and recorded the statements of witnesses. He completed investigation and laid charge before court.

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

5. The latter court, on receipt of records and on appearance of the accused framed charge for the offences punishable under Section 55(g) 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 P9 marked. M.Os. 1 and 2 were identified and marked.

6. After the close of the prosecution evidence, the accused was questioned under Section 313 Cr.P.C. In which he denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent. He asserts that he is innocent and pointed out that on the date of the incident he was not present at the place. He also stated that the place of occurrence shown as House No. 107 of Ward No.E.P.IX does not belong to him and the property in which the house is situated also does not belong to him. It is also stated Marykutty is not his wife. The articles alleged to have been seized from the house of the accused were not recovered from his house or compound. He claims that he has been falsely implicated with the intention of saving the real culprits. 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. The court below, relying on the evidence of P.Ws. 1, 4 and 5 and also the seizure mahazar and chemical analysis report, came to the conclusion that the prosecution has established the case beyond reasonable doubt and found the accused guilty and conviction and sentence as already mentioned followed. The said conviction and sentence are assailed in this appeal.

8. Assailing the conviction and sentence, it is pointed out by the learned counsel for the appellant that the prosecution has not produced the forwarding note which contains the sample seal and that is fatal to the prosecution case. It is also contended that there is no attempt from the side of the prosecution to establish that the property from which the contraband article was seized belonged to the accused. It is contended that the accused had specifically denied that the lady who had signed in the mahazar, namely,

Marykutty, was his wife and it is significant to notice that the investigating officer had not even questioned the lady. No documents were produced to show the ownership or possession of the property.

9. Learned Public Prosecutor on the other hand pointed out that the evidence of P.Ws.1, 4 and 5 are sufficient to show that the prosecution has succeeded in establishing the case against the accused. The court below has chosen to analyze the evidence in considerable detail and found that it is creditworthy and a conviction can be based on the same. The fact that the accused had run away from the place itself show that he is guilty. At any rate, his wife had signed in Ext.P3 mahazar and it is sufficient to show that he was in possession of the property.

10. After having heard learned counsel on both sides and having perused the records, it is difficult to sustain the order of conviction for more than one reason. True, P.W.1

does say about the detention undergone by him in detail. P.W.1 says about having obtained information about the activity in the case and had gone to the place of occurrence. He says that when the excise party reached the place, the accused was standing in the courtyard. Finding the excise officers, he took to his heels. He could not be apprehended. P.W.1 then says about having entered the house and conducted search. Nothing could be recovered from the house and from 25 feet behind his house M.Os. 1 and 2 were recovered. It contained liquor and on examination it was found to be wash. He speaks about having prepared Ext.P2 search list, Ext.P3 seizure mahazar etc. and later having returned to his office and having prepared occurrence report. He speaks about having produced the articles before court along with forwarding note.

11. P.W.2 is an independent witness. He turned hostile to the prosecution case. He denies his signature in the

document shown to him.

12. P.W.3 is also an independent witness. He also denied having seen the incident and prosecution obtained no help from his evidence.

13. Then there is the evidence of P.W.5, the Investigating Officer. He took over investigation on 16.9.2005. It must be remembered that the detection was on 21.10.2003.

14. One of the contentions raised is that there is no evidence to show that the property from where the articles were seized belonged to the accused or he is in possession of the same. The court below was satisfied by the plan prepared by the Village Officer and held that that would be sufficient to show that the property belonged to him and so also was greatly impressed by the fact that Marykutty had signed Ext.P3.

15. Here one has to notice that the accused had stated that he had no connection with Marykutty at all. P.W.5, the Investigating Officer should have obtained records from the local authority or such other authority to establish the fact that the place from where the articles were seized belonged to the accused or he was in possession of the same. There was no such attempt from the side of the Investigating Officer at all. Even though P.W.1 says about having prepared forwarding note, copy of the same is not seen marked in the case. So it is not possible to ascertain whether the forwarding note contained the specimen seal at all. This question was considered in the decision reported in Krishnan v. State (2015 (2) KLT SN 8) wherein it was held as follows:

“Ext.P5 is a copy of the Forwarding Note submitted before the court for sending sample for subjecting it to chemical analysis. A specific space is provided in the Forwarding Note for affixing the sample seal. No such sample seal was affixed on Ext.P5. Whether the sample seal was affixed on the original of Ext.P5 sent to the

Chemical Examiner? Normally, if the sample seal is not appearing in the copy of the Forwarding Note, in this case it is Ext.P5, it has to be presumed that such sample seal was not affixed on the original Forwarding Note unless proved otherwise. A copy of the Forwarding Note is kept in the office of the court for serving certain purposes. The purposes are evidence from the contents of the form of the Forwarding Note itself. They include the quantity and description of the sample drawn from the bulk of the contraband, the details of the case and the space for providing the sample impression of the seal affixed on the sample taken from the bulk of the contraband. Therefore, as already stated, the absence of sample seal in the space provided in the copy of the Forwarding Note. Is sufficient reason for presuming that the sample seal is not provided in the original Forwarding Note. Of course, this is only a rebuttable presumption. In the case on hand, such presumption has not been rebutted by the prosecution.”

16. Further, it is strange to note that P.W.5 the Investigating Officer who even after taking note of the fact that the accused was denying that Marykutty was not his wife, does not bother to question her. The cross-examination of

P.W.5 makes a very sad reading. He had not done any investigation at all. He had not bothered to question the witnesses at all and he had seen the accused for the first time in court. It is shocking to note that he has not made any person whose statement has been taken as a witness to the case and the persons who were along with P.W.1 had neither been questioned nor made as witnesses.

17. It is in the light of the above facts and circumstances of the case that conviction and sentence entered by the court below will have to be viewed. The lacuna in the investigation and also the long delay in filing final report make it extremely hazardous for the court to enter a finding against the accused. For the above reasons, this Court is unable to concur with the finding of the court below that the offence has been made out.

In the result, 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.