

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 13TH DAY OF NOVEMBER 2015/22ND KARTHIKA, 1937

CRL.A.No. 527 of 2006 ()

**AGAINST THE JUDGMENT IN SC 456/2004 of ADDITIONAL SESSIONS COURT, FAST
TRACK - III (ADHOC), MANJERI DATED 22-02-2006**

IN CP 54/2004 OF JUDICIAL FIRST CLASS MAGISTRATE -I, MANJERI

APPELLANT(S)/ACCUSED:

**SREEDHARAN, S/O.KUTTIKUNHAN,
MOORKKANPOYIL, ELAMKUR, MALAPPURAM DISTRICT.**

BY ADVS.SRI.BABU S. NAIR

RESPONDENT(S)/STATE:

**THE STATE OF KERALA, REPRESENTED BY
THE EXCISE INSPECTOR, MANJERI EXCISE RANGE -
THROUGH THE PUBLIC PROSECUTOR, HIGH COURT OF, KERALA
ERNAKULAM, KOCHI-31.**

BY PUBLIC PROSECUTOR SMT. S. HYMA

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 13-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 527 of 2006

Dated this the 13th day of November, 2015

J U D G M E N T

The accused was prosecuted for the offence punishable under Section 8(1) of the Abkari Act. After trial, he was found guilty. He was therefore convicted and sentenced to suffer rigorous imprisonment for two years and to pay a fine of ₹1 lakh with a default clause of six months. Set off as per law was allowed.

2. The incident in this case occurred on 13.11.2002. PW1 at the relevant time was functioning as the Preventive Officer attached to Malappuram Excise Special Squad. He along with PW2 on 13.11.2002 at about 5.45 p.m., while on patrol duty, happened to see the accused coming along the road carrying a blue coloured can. Feeling suspicious about his conduct, he was intercepted and the can was seized. The can had a capacity of 5 litres and it contained some liquid. The can was opened and on verification by tasting and smelling the liquid, PW1 formed the opinion that it was

arrack. The arrest memo prepared is Ext.P1. PW1 then took a sample of 200ml in a bottle of 375ml capacity and then had the sample as well as the balance contraband articles sealed and labelled. The labels contained the signatures of accused, PW1 and the witnesses. The mahazar prepared by PW1 at the spot is Ext.P2. Ext.P4 is the occurrence report prepared by him. PW1 entrusted the documents, material objects and the accused to PW4. PW4 at the relevant time was functioning as the Preventive Officer attached to Manjeri Excise Range. He says that on the date of incident at about 11.25 p.m., PW2 handed over the accused, the records and the material objects to him and at 5 O'Clock in the morning, he handed over these articles to Mr. K.M. Mohandas. PW6 conducted further investigation in the case, recorded statements of witnesses and after completing investigation, charge was laid 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, Manjeri 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-III (Adhoc), Manjeri, 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) 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 6 examined and had Exts.P1 to P9 marked. MO1 can 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.

7. Finding that he could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. He chose to adduce no evidence.

8. On an appreciation of the evidence in the case, the court below formed the opinion that the prosecution has succeeded in establishing the case against the accused and therefore, convicted and sentenced him as already mentioned.

9. Assailing the conviction and sentence, the learned counsel appearing for the appellant pointed out that the contradictions between the entries in Exts.P1 and P4 and the evidence of PW1 regarding the time of arrest have been overlooked by the court below. It is also pointed out that it will be imprudent on the part of the court to simply rely on the evidence of official witnesses without any supporting evidence from independent quarters. It is contended that since the independent witnesses have turned hostile, there is no supporting evidence in favour of the prosecution and

under such circumstances, at least, the benefit of doubt should have gone in favour of the accused. Finally, the learned counsel contended that the sentence imposed is too harsh and is disproportionate to the offence committed by the accused.

10. The learned Public Prosecutor pointed out that the case is almost flawless and all procedural formalities have been complied with. The evidence of PWs 1 and 2 clinch the issue and clearly show that the contraband articles have seized from the possession of the accused. Sampling was done by PW1 and all formalities were completed. The inconsistency pointed out regarding the time of arrest, according to the learned Public Prosecutor, is too insignificant to doubt the prosecution version. The contemporaneous document namely, Ext.P2 further confirms that the incident has occurred as alleged by the prosecution. In short, the contention is that there are no grounds made out to interfere with the findings of the court below.

11. As rightly pointed out by the learned counsel for the appellant, the evidence regarding detection stands confined to the testimony of PWs 1 and 2. Among them, PW1 was the Preventive Officer and PW2 was also an officer of the Excise Department. Both of them say that as they were going along the road on patrol duty, they happened to see the accused with a can. He was approached and then the contents of the can was examined in the presence of witnesses. By taste and smell, PW1 came to the conclusion that the article that was being taken in the can was arrack. Pointing out the offence committed by the accused, he was arrested after preparing the arrest memo. PW1 had taken a sample of 200ml from the contraband seized by him in a bottle having a capacity of 375ml. Thereafter they returned to the Station with the accused, the documents and the material objects.

12. It could be seen from a reading of the evidence of PWs 1 and 2 that they give a consistent narration of the

incident that led to the registration of the crime. Even though they were cross examined at length, nothing which would discredit them could be brought out from their evidence. Of course, as already stated, PW1 would say that the arrest was at 5.30 while Exts.P1 and P2 would show that the arrest was at 5.45 p.m.. As rightly pointed out by the learned Public Prosecutor, that cannot be ballooned to such an extent to doubt the prosecution version of the incident. Such minor discrepancies are bound to arise as time passes by.

13. Reading the evidence of PWs 1 and 2 as a whole, there is no doubt that the incident has occurred as alleged by the prosecution. Even assuming that there is no corroboration from the independent quarters, there is no justification for this Court to reject the evidence of PWs 1 and 2 especially, in the light of Ext.P2 mahazar. Further, Ext.P9, the Chemical Analysis Report goes against the accused.

14. The court below has considered the evidence in considerable detail and has come to the conclusion that the offence has been made out. It is a possible and reasonable finding. Hence, it does not call for any interference. Conviction has only to stand.

15. However, there is considerable force in the submission made by the learned counsel for the appellant that the sentence imposed is too harsh and is disproportionate to the offence committed by the accused. Moreover, the learned counsel for the appellant points out that the offence is of the year 2002 and nearly 14 have elapsed and now to upset the settled position, it may cause more injury contrary to what is intended. It is therefore contended that leniency be shown with regard to the sentence.

16. After having given anxious consideration to various aspects, it could not be said that the factors urged by the learned counsel for the appellant are totally

irrelevant. Of course, the sentence has to bear a proportion to the offence committed. The quantity of contraband seized in this case is only two litres. There is nothing to show that the accused has a bad antecedent or that subsequently, he involved in such incident.

Considering all these factors, it is felt that some leniency needs to be shown with regard to the sentence. Hence, while sustaining the conviction of the accused for the offence punishable under Section 8(1) of the Abkari Act, the sentence imposed by the court below is set aside and instead, he is sentenced to undergo simple imprisonment for a period of three months and to pay of 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