

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 26TH DAY OF OCTOBER 2015/4TH KARTHIKA, 1937

CRL.A.No. 540 of 2006

AGAINST THE JUDGMENT IN SC 395/2001 of ADDITIONAL SESSIONS
COURT FOR TRIAL OF ABKARI ACT CASES, NEYYATTINKARA
DATED 13-02-2006

APPELLANT/ACCUSED:

SUDHEER KUMAR, S/O. CHELLAPPAN NADAR,
SURESH BHAVAN, PARASSALA VILLAGE.

BY ADV. SRI.M.SREEKUMAR

RESPONDENT/COMPLAINANT:

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

BY SMT. LILLY LESLIE, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
26-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.540 OF 2006

Dated this the 26th day of October, 2015.

J U D G M E N T

The accused was prosecuted for the offence under Section 55(a) of Abkari Act. He was found guilty and was therefore convicted and sentenced to suffer rigorous imprisonment for two years and to pay a fine of Rs.1 lakh with default clause of rigorous imprisonment for three months.

2. The allegation is that on 16.08.1998, while PWs 3 and 4 were on patrol duty, when they reached behind the Mahadeva temple, they found a person standing close to the southern side of a shop with a sack. When the Excise Officers reached near him, he kept the sack down and ran away. PW4 examined the contents of the sack and found that it contained 12 bottles of Indian Made Foreign Liquor and 2 bottles of Empee Fine brandy totalling to 14 bottles. Mahazar was prepared and they returned to the Station and registered crime as per Ext.P2 First Information Report. After having ascertained the identity of the

accused, Ext.P3 report was filed. Ext.P4 property list was prepared and the court received the articles on 21.08.1998.

3. Investigation was conducted by the Circle Inspector of Police and after completing investigation, charge was laid before court.

4. The court before which final report was laid took cognizance of the offence and finding that the offence is exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Thiruvananthapuram under Section 209 Cr.P.C. The said court made over the case to Additional Sessions Court for trial of Abkari Act cases, Neyyattinkara for trial and disposal. The latter court framed charge for the offence under Section 55(a) of Abkari Act, to which, the accused pleaded not guilty and claimed to be tried.

5. The prosecution, therefore, had PWs 1 to 5 examined and Exts.P1 to P7 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. He stated that he never had a shop of his own and that he owned a marriage auditorium and the Sub Inspector asked him to rent out the same free of cost, to which, the accused was not amenable and therefore he was falsely implicated.

7. 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.

8. The court below, greatly impressed by the evidence of PWs 3 and 4 and Ext.P1 mahazar prepared by PW4 and also on the basis of Ext.P6, found that the offence had been made out and accordingly, convicted and sentenced the accused as already mentioned.

9. Assailing the conviction and sentence, learned counsel appearing for the appellant contended that first of all charge is only for possessing Indian Made Foreign Liquor without proper bill and if that be so, offence under Section 55(a) of Abkari Act can never be attracted. In other words, according to the learned

counsel, the quantity seized is only 2.5 liters of Indian Made Foreign Liquor whereas permissible quantity is 3 liters. Learned counsel then went on to point out that there is no evidence to show that sampling was done properly and sealing and labeling was done in accordance with law. Neither PW3 nor PW4 spoke about the same. The detection was on 16.08.1998 while the article was produced before court on 21.08.1998. No explanation is offered for the delay. Apart from the above fact, forwarding note is not seen marked and none of the witnesses namely, PW3 and PW4 speak about the forwarding note. Though PW5 says about having forwarded the sample for chemical analysis on the basis of forwarding note, there is no evidence at all to indicate as to who had prepared the forwarding note and whether it contains the sample seal. The above infirmities, according to the learned counsel, makes the prosecution case weak.

10. Learned Public Prosecutor, on the other hand, contended that the evidence of PW5 is sufficient to show that there was forwarding note and sample was forwarded as per the same. There is no reason to disbelieve PWs 3 and 4 and also the

contemporaneous document Ext.P1. The court below has relied on these documents to find the accused guilty. It could not be said that the finding is perverse.

11. It is extremely difficult to believe the prosecution version that the offence under Section 55(a) of Abkari Act is attracted. The said decision deals with imports, exports, transports, transits or possesses liquor or any intoxicating drug. There is no allegation in the case on hand as to whether there is imports, exports, transports, transits or possession as is envisaged under Section 55(a). Therefore, that offence is not made out.

12. Even otherwise, on merits, the prosecution has to fail. Neither PW3 nor PW4, the two officers who were present at the time of detection of offence, speak about the labeling or sealing of the samples. In fact, PW4, detecting officer, though speaks about having prepared Ext.P1 mahazar, he does not say anything about preparation of forwarding note. Ext.P1 mahazar only says that contraband article was seized and it is interesting to see that final report laid mentions only that the accused was found in

possession of articles without any proper document. The investigating officer has not been examined in the case. There is no evidence to show whether forwarding note was prepared and sent to court. At any rate, forwarding note, though PW5 speaks about the same, is not seen marked at all.

13. Add to the agony of the prosecution, the detection was on 16.08.1998 and the contraband article was produced before court only on 21.08.1998. Even though PW4 says that the articles were in his custody, he was unable to explain the delay in production of articles before court.

14. This Court had occasion to consider a similar situation in **Ramankutty vs. Excise Inspector, Chelannur Range** (2013 (3) KHC 308) and held that unexplained delay is fatal. Merely because PWs 3 and 4 say about seizure etc, that does not mean that the offence is made out. It would appear from the records that the only case of the prosecution was that the accused was in possession of Indian Made Foreign Liquor without any supporting document. Here, the contention of the learned counsel for the appellant that the total quantity seized is 2.5 liters and the

permissible limit is 3 liters may have relevance. However, one need not go into that aspect since the prosecution has to fail on the above grounds.

For the above reasons, this appeal is allowed. The conviction and sentence passed by the court below are set aside and it is held that the prosecution has not succeeded in establishing the case against the accused. The accused is acquitted of the charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

Sd/-

**P.BHAVADASAN
JUDGE**

smp

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P.A to Judge.