

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 30TH DAY OF SEPTEMBER 2015/8TH ASWINA, 1937

CRL.A.No. 548 of 2006 (F)

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AGAINST THE JUDGMENT IN SC 527/2004 of ADDITIONAL SESSIONS  
COURT (ADHOC)-II, THODUPUZHA.

APPELLANT(S)/IST ACCUSED:

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SAJI @ SURESH, S/O.KRISHNAN,  
AGED 36 YRS, RESIDING AT KOCHUKUDIYIL HOUSE,  
UPPUTHARA VILLAGE, PARIKANNI KARA.

BY ADV. SRI.T.MADHU

RESPONDENT(S)/STATE & COMPLAINANT:

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1. STATE OF KERALA, REPRESENTED BY  
THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,  
ERNAKULAM.
2. THE SUB INSPECTOR OF POLICE,  
UPPUTHARA POLICE STATION, 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  
30-09-2015, THE COURT ON THE SAME DAY DELIVERED THE  
FOLLOWING:

P. BHAVADASAN, J.

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Crl.Appeal. No. 548 of 2006  
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Dated this the 30<sup>th</sup> day of September, 2015.

JUDGMENT

Two persons were sought to be prosecuted for the offences punishable under Sections 8(1) and 8(2) of the Abkari Act. Among them the first accused alone was found guilty. The second accused stood acquitted of all charges. First accused suffered conviction for the offences punishable under Sections 55(a) and 8(2) of the Abkari Act and he was sentenced to undergo rigorous imprisonment for two years and fine of Rs.1,00,000/–, in default to undergo rigorous imprisonment for three months.

2. The incident which gave rise to the case occurred on 19.8.2001 late in the night. On that day, at about 11.15 p.m. P.W.5, the Sub Inspector of Police attached to Upputhara Police Station along with his team of officers had gone on patrol duty. As they were coming along the road,

they found a person standing with a can in the bylane near the shop of one Dasan. On seeing the police jeep, he tried to escape. He was intercepted and questioned and then it was found that he was carrying a can containing 10 litres of spirit. P.W.1 examined the contents and by tasting and smelling the same it was realized that the article in the can was spirit. The first accused was arrested. He then claims to have taken three samples of the same and sealed and labelled the same containing his signature as well as the signature of accused and the witnesses. Later he returned to the police station and on the basis of the records he collected, registered Crime No. 139 of 2001 as per Ext.P3 FIR. He claims to have drawn up Ext.P1 at the place of incident. The arrest memo prepared at the time of arrest of the first accused is Ext.P5. P.W.5 says that during investigation it was revealed that it was the second accused who had entrusted the article for sale to the first accused. Therefore he too was arrayed as an accused. He

then says about having send the sample for chemical examination and having obtained Ext.P7. He completed investigation and laid charge before court.

3. The court, before which final report was laid, took cognizance of the offences. Finding that the case is one exclusively triable by a court of Sessions, the said court committed the case to Sessions Court, Thodupuzha. One aspect needs to be noticed here. The records indicate that FIR as well as the final report was filed before JFCM Court, Peermedu. But the order committing the case to Sessions Court seems to have been passed by JFCM Court, Kattappana. It is not discernible from the records as to how the case happened to be transferred from JFCM Court, Peermedu to JFCM Court, Kattappana. Be as it may. On getting committal records, the Sessions Court made over the case to Additional Sessions Court (Adhoc)-II, Thodupuzha for trial and disposal. The latter court framed charges for the offence punishable

under Section 8(2) of the Abkari Act.

4. To the charge, the accused pleaded not guilty and claimed to be tried. The prosecution therefore examined P.Ws.1 to 5 and had Exts.P1 to P7 marked. M.O. 1 was got identified and marked. After the close of the 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 further stated that he was an employee of a toddy shop and he goes every morning to tap toddy. On 9<sup>th</sup> April also he left the shop and on the next day he came to know that he was arrayed in a case. Finding that the accused could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. He examined D.W.2. The trial court found the evidence of P.W.5 acceptable and convincing enough coupled with Ext.P1 contemporaneous document prepared by P.W.5 and found it sufficient to come to the

conclusion that the offence has been established by the prosecution. Conviction and sentence as already mentioned followed.

5. One strange fact has to be noticed at this point itself. Even though charge was only for the offences under Sections 8(1) and 8(2) of the Abkari Act, the conviction was for the offence under Section 55(a) and 8(2) of the Abkari Act. One has to recollect that there is no charge under Section 55 (a) of the Abkari Act against the accused. As already stated the second accused was acquitted of the charges.

6. Assailing the conviction and sentence, learned counsel for the appellant pointed out that there is absolute want of evidence to show the complicity of the first accused. There is only the evidence of P.W.5 and that is far from convincing. Apart from the fact that independent witnesses have turned hostile and refused to support the prosecution case, even though there is evidence of P.W.3, it goes against

the prosecution. Neither in Exrt.P1 nor in the evidence of P.W.5 there is mention about the presence of P.W.3 at the spot at the relevant time. According to the learned counsel, the detection of the offence was on 19.8.2001. But the articles were produced before court only on 23.8.2001. The delay of more than 4 days remained unexplained by P.W.5. Further surprising is that according to the learned counsel that the sample was sent for analysis only on 22.4.2002, i.e., almost 8 months after the incident. This delay is also not explained. Learned counsel contended that this long delay causes suspicion and it is extremely doubtful whether it was the sample alleged to have been taken from the can which was said to be in the possession of the first accused. These legal infirmities have been conveniently overlooked by the court below and mechanically accepted the evidence of P.W. 5 and found the accused guilty. According to the learned counsel, a fair scrutiny of the materials and analysis of the evidence

would show that the prosecution has not succeeded in establishing the case against the accused and if that be so, the accused is entitled to benefit.

7. Learned Public Prosecutor however sought to support the finding of the court below. According to him, there is no reason as to why P.W.3 should be disbelieved and in the light of his evidence taken along with the evidence of P.W.5, the incident stands proved. The contemporaneous document Ext.P1 gives a detailed description regarding the incident and these are sufficient to warrant a finding that the accused was carrying contraband article. It is not the law, according to the learned Public Prosecutor, that there should be independent corroborative evidence so as to accept the evidence of Excise Officer or Police Officer to reach a conclusion. If the evidence of officer concerned is found to be creditworthy, there is no harm in reaching a conclusion on the basis of that evidence.

8. At any rate, according to the learned Public Prosecutor, the court below has chosen to accept the evidence and found the accused guilty and there is no reason to take a different view.

9. P.Ws.1 and 2 are two independent witnesses who have witnessed the actual incident. They turned hostile and their evidence serves no purpose. Of course they do admit their signatures in the mahazar, but stated that it was affixed at a different place.

10. The evidence of P.W.3 assumes importance in this matter. He says that he was an eye witness to the incident. According to him, he runs a shop nearby and he happened to see police officers coming to the place and the accused standing near the bylane. He would also say that there was a can by the side of the first accused and he happened to see P.W.5 asking something to the first accused. The person who was running Hotel Elite was also present there

so also the street vendor who was selling tea nearby. He says that records were prepared by the police at the place itself and collected 1/3<sup>rd</sup> of the liquid in a jar. He also says about samples having been taken by the police and even goes a step further and says that he was made to smell the liquid and his statement was also taken.

11. The other evidence is furnished by P.W.5 the detecting officer. He says about having gone on patrol duty along with other officers and having come across a person near the bylane near the shop of Dasan. He then speaks about having intercepted the accused when he tried to escape and the accused is said to have disclosed that he is carrying 10 litres of spirit. He speaks about samples being taken. He then speaks about having returned to the police station and registered crime as per Ext.P3 FIR.

12. If the evidence of P.Ws. 3 and 5 could be accepted the submission of the learned Public Prosecutor is

well founded. If that be so, the conviction has to stand. However, it has to be noticed that presence of P.W.3 is not spoken to by P.W.5 in his evidence nor his presence is noticed in Ext.P1 contemporaneous document. One may recall here that P.W.3 has an active role to play in the incident. He was present at the spot at the relevant time and he was made to smell the contents of the can. If that be so, it is difficult to believe that his name would not have been mentioned in Ext.P1 or P.W.5 at the time of evidence would have urged that P.W.3 was present at the relevant time. Absence of the name of P.W.3 in Ext.P1 and non-mentioning of his presence by P.W.5 at the relevant time in his evidence creates suspicion of his presence at the relevant time. Apart from all the same is the delay in forwarding the articles seized to the court concerned. Articles were seized and accused was arrested on 19.8.2001 and the material seems to have reached the court only on 23.8.2001. P.W.5 had a very vague explanation that

he wanted to directly produce the articles before court and that caused the delay. One fails to understand what he meant by the above statement. Nothing prevented him from directly producing the articles on the next day itself.

13. This Court in the decision reported in Ramankutty v. Excise Inspector, Chelannur Range (2013(3) KHC 308) had occasion to consider the question of delay in producing the articles before court. Of course, a Division Bench of this Court had occasion to deal with the question as to what one meant by to produce forthwith and in that context it has been held that in case there is delay, it has to be satisfactorily explained. In the decision reported in Ramankutty v. Excise Inspector, Chelannur Range (2013(3) KHC 308) it was held that unexplained delay in producing the contraband article before court after seizure is fatal to the prosecution case. It was also held that non-compliance of the mandatory requirements to be followed at the time of arrest

and non-disclosure of the custodian of the contraband during the delayed period make the delay decisive and fatal to the prosecution case.

14. It is significant to notice that there is no forwarding note produced before this Court and marked in this case. It is even more surprising to note that the sample reached the court only on 23.8.2001, i.e., almost 8 days after the incident. Learned counsel for the appellant may be well justified in his submission that this creates reasonable doubt as to whether the sample that reached the Forensic Science Laboratory is the sample which had been taken from the can in the possession of the first accused.

15. In the light of the decision cited above, and in view of the long and unexplained delay coupled with the fact that presence of P.W.3 is open to serious doubt, learned counsel for the appellant is well justified in his submission that the incident has not occurred as stated by the

prosecution. If that be so, the benefit should certainly go to the accused.

Hence, this appeal is allowed, the conviction and sentence passed by the trial court shall stand quashed and the accused stands acquitted of all the charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

P. BHAVADASAN,  
JUDGE

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