

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 16TH DAY OF NOVEMBER 2015/25TH KARTHIKA, 1937

CRL.A.No. 571 of 2006

AGAINST THE JUDGMENT IN SC 660/2004 of ADDL.SESIONS COURT
(ADHOC-II) KASARAGOD DATED 17-02-2006

APPELLANTS/ACCUSED:

1. V.K.SREEVALSAN, S/O.C.BALAKRISHNAN NAIR,
KAMMALAMKAYA, MUNNAD VILLAGE,
KASARAGOD DISTRICT.
2. C.RAGHAVAN, S/O.K.NARAYANAN NAIR,
MUNDIAKKAL, KAMMALAMKAYA, MUNNAD VILLAGE,
KASARAGOD DISTRICT.

BY ADV. SRI.M.RAMESH CHANDER

RESPONDENTS/COMPLAINANTS:

1. STATE OF KERALA,
REP. BY ITS PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.
2. EXCISE INSPECTOR,
KASARAGOD EXCISE RANGE, KASARAGOD.

BY SMT.S.HYMA, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
16-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.571 OF 2006

Dated this the 16th day of November, 2015.

J U D G M E N T

Two persons were prosecuted for the offence punishable under Section 55(a) of Abkari Act. They were found guilty and each of them were convicted and sentenced to suffer rigorous imprisonment for two years and to pay a fine of Rs.1 lakh each with default clause of rigorous imprisonment for one year each. Set off as per law was allowed.

2. On 29.01.2000, while PW1 was functioning as Excise Range Inspector at Kasaragod, as usual, he set out for patrol duty along with his team of officers. While they were passing the Karicheri bus stop, they happened to see two persons carrying sacks on their head going along the road. Seeing the Excise Officials, they tried to keep down the sack and escape. They were intercepted and the sacks were seized. Each of the sacks were seen to contain 300 packets of 100ml liquid and by taste

and smell, PW1 convinced that the liquid was arrack. Same was the case of content in the other sack also. Exts.P1 and P1(a) arrest memos were prepared and both the persons were arrested. From the first sack which he opened, PW1 had two more packets opened and the contents were poured into a bottle having a capacity of 375 ml from which 290 ml was taken as sample. It was sealed and labeled. Same was done in the case of other sack also. Three emptied packets along with other packets were tied, sealed and labeled and on the sample and also on the balance contraband articles, labels were affixed showing the signature of accused, witnesses and PW1. Ext.P2 is the mahazar prepared by PW1. PW1 returned to his office and registered Crime No.4/2002 as per Ext.P3 crime and occurrence report. He prepared the property list Ext.P4 and forwarding note Ext.P5 and sent the accused and articles along with documents to the court immediately.

3. PW5 was functioning as Excise Circle Inspector at Kasaragod at the relevant time. He was in charge of

investigation of the case. He recorded the statement of witnesses, prepared the scene mahazar Ext.P9 and also obtained chemical analysis report Ext.P10. He completed the investigation and laid charge 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, Kasaragod. The said court made over the case to Additional Sessions Court (Adhoc) II, Kasaragod for trial and disposal. The latter court, on receipt of records and on appearance of the accused, 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 6 examined and Exts.P1 to P10 marked. M.O.s 1 and 2 were got identified and marked.

6. After the close of the prosecution evidence, accused were questioned under Section 313 Cr.P.C. They denied all the

incriminating circumstances brought out in evidence against them and maintained that they were innocent.

7. Finding that the accused could not be acquitted under Section 232 Cr.P.C, they were asked to enter on their defence. They chose to adduce no evidence.

8. Finding the evidence of PW1, detecting officer and PW6, the officer who accompanied PW1 for patrol duty, to be cogent and also corroborated by the contemporaneous document namely, Ext.P2 and also impressed by the fact that the article and accused were promptly produced before court concerned, trial court found the accused guilty. The conviction and sentence as already mentioned followed.

9. Assailing the conviction and sentence, learned counsel appearing for the appellants contended that the inconsistencies and contradictions in the evidence of PWs 1 and 6 have been overlooked by the court below and one significant aspect is that the forwarding note contains two separate type of seals which is unexplained by the prosecution.

10. Drawing attention to the evidence of PW1, it is pointed out by the learned counsel for the appellants that he has a definite case that sample was taken from the contraband articles seized and he affixed seal on the sample and if that be so, forwarding note could not have contained two distinct seal and the prosecution has failed to establish its authenticity. Therefore, it could not be said that the samples which reached the laboratory are samples taken from the contraband seized from the possession of the accused.

11. Learned Public Prosecutor, on the other hand, contended that there is absolutely no merit in the above contention. The evidence regarding detection is furnished by PWs 1 and 6 and they are convincing and cogent. Even though independent witnesses have turned hostile, evidence of PWs 1 and 6 gets support from contemporaneous document Ext.P2 and also the fact that PW1 had the accused, articles and documents promptly produced before court. As far as the seal on Ext.P5 is concerned, learned Public Prosecutor pointed out that if there is

any ambiguity, it is the duty of the defence to bring it to the notice of either PW1 or PW5 and seek an explanation for the same. Without having done so, merely because two seals are found, it does not lead to the conclusion that samples which reached the laboratory are different from the samples taken from PW1. Learned Public Prosecutor pointed out that the court below has considered all the aspects in detail and there are no grounds made out to interfere with the conviction and sentence.

12. As could be seen from the records, evidence regarding detection of offence is available from the testimony of PWs 1 and 6. Among whom, PW1 was the Excise Inspector and PW6 was the Preventive Officer. They along with team of officers went for routine patrol duty and while they were going along the road, they happened to see the accused carrying sacks on the head. Seeing the Excise Officials, they panicked which caused suspicion in the mind of officers who intercepted them and seized the sacks and on examination each sacks was seen to contain 300 packets of 100ml liquid. PW1 opened one of the packets from each of the

sacks and by taste and smell, he recognised the liquid as arrack. PW1 had two more packets opened and the contents were poured into a bottle having a capacity of 375 ml from which 290 ml was taken as sample. Same was done in the case of other sack. He is definite that he had affixed his personal seal on each of the samples and the balance articles. It is he who registered crime and drawn up property list and also forwarding note. It is he who had caused production of accused and articles before court.

13. The evidence of PW1 gets support from PW6 who had accompanied PW1 for patrol duty. Even though PWs 1 and 6 were cross examined at length, nothing could be brought out in their evidence to suspect the prosecution version. The uniform version given by PWs 1 and 6 go a long way in favour of the prosecution.

14. True, the two independent witnesses namely, PWs 3 and 4 turned hostile to the prosecution. But it is not the rule that the evidence of official witnesses will have to be corroborated by independent evidence. If the evidence of the official witnesses

are found to be cogent and convincing and that inspires the mind of court, there is no justification as to why it should not be accepted. In the case on hand, as already noticed, evidence of PWs 1 and 6 are consistent, cogent and convincing enough. Moreover, there is no suggestion to PW1 or PW6 as to why they should falsely implicate the accused.

15. Added to the above circumstance is the contemporaneous document Ext.P2 which contained all the details of what had transpired. The fact that the articles, documents and accused were promptly produced before court rules out the possibility of manipulation and fabrication of documents.

16. Coming to the question of type of seal found on Ext.P5, as rightly pointed out by the learned Public Prosecutor, if there is any ambiguity, it was open for the defence to complain about the same to either PW1 or PW6. PW1 has categorically stated that it was his personal seal which was affixed on the samples and if there was any difference, it was for the defence to bring it out.

Without having given an opportunity to the prosecution witnesses to explain, it comes with little grace for the accused now to say that there is ambiguity of the sample sent for chemical analysis. That contention is only to be rejected.

17. The court below was therefore perfectly justified in coming to the conclusion that the offence had been made out. The conviction under Section 55(a) of Abkari Act cannot stand and only conviction under Section 8(1) of Abkari Act can stand. It is so done.

18. Faced with the above situation, learned counsel appearing for the appellants pointed out that the sentence imposed is too harsh and is disproportionate to the offence committed. It is submitted that at the passage of time, it may be inappropriate to upset the present state of affairs. It is also submitted that the accused have no criminal antecedents and they are not indulged in any nefarious activities and therefore they may be given an opportunity to reform themselves.

19. After having heard the learned counsel for the

appellants, the learned Public Prosecutor and also considering the various aspects, it is felt that some leniency can be shown with regard to sentence.

While upholding the conviction for the offence under Section 8(1) of Abkari Act, sentence imposed by the court below is set aside and each of the accused is sentenced to suffer rigorous imprisonment for three months and to pay a fine of Rs.1 lakh each with default clause of simple imprisonment for two months each.

This Criminal Appeal is disposed of as above.

Sd/-

**P.BHAVADASAN
JUDGE**

smp

// True Copy //

P.A to Judge.