

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 17TH DAY OF DECEMBER 2015/26TH AGRAHAYANA, 1937

CRL.A.No. 615 of 2006 ()

**AGAINST THE JUDGMENT IN SC 266/2005 of ADDITIONAL SESSIONS COURT
(SPECIAL COURT FOR NDPS ACT CASES), THODUPUZHA DATED 25-02-2006**

CP 53/2004 OF JUDICIAL FIRST CLASS MAGISTRATE, ADIMALI

APPELLANT(S)/ACCUSED NO.1::

**DAMODARAN, S/O. KUTTAN, VADAKKEDATHU
HOUSE, MUNIYARA KARA, KONNATHADI VILLAGE.**

**BY ADVS.SRI.C.M.TOMY
SRI.MATHEW SKARIA**

RESPONDENT(S)/COMPLAINANT::

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

BY PUBLIC PROSECUTOR SMT. S. HYMA

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 17-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 615 of 2006

Dated this the 17th day of December, 2015

J U D G M E N T

Two persons were prosecuted for the offence punishable under Section 55(g) of the Abkari Act. Among them, the first accused alone was found guilty. He was therefore convicted and sentenced to suffer simple imprisonment for one year and to pay a fine of ₹1 lakh with a default clause of simple imprisonment for a further period of one year.

2. According to the prosecution, on 26.02.2002, while PW3 and his team of officers were on law and order duty, he received reliable information that wash was stored in the house of the first accused. On receipt of such information, house No. VI/768 of Konnathadi Panchayat was searched. Nothing could be recovered from the house. While they inspected the surroundings of the house, they able to locate two pits. As they felt strong smell of wash, they further

probed into the matter. Further search yielded 15 litres of wash. They were also able to locate an aluminium utensil. There was another aluminium vessel of 8 litres in which a pot was kept. Several other utensils were also found on the place. From the 50 litres capacity can which contained wash, 500ml was taken as sample. That is numbered as No.1. From the other can, they had also taken sample of 500ml and that is marked as No.2. PW3 returned to the Police Station along with the contraband articles and registered Crime No. 64/02 under Section 55(g) of the Kerala Abkari Act. Ext.P3 is the memo prepared at the spot. The articles seized were produced before court and a requisition was made to court to send the sample for chemical examination. Ext.P8 is the Chemical Analysis Report and Ext.P9 is the ownership certificate obtained by PW3. He completed investigation and laid charge 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, Thodupuzha under Section 209 of Cr.P.C. after following the necessary procedures. The said court made over the case to Additional Sessions Court/Special Court for NDPS Cases, Thodupuzha, 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 55(g) 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 5 examined and had Exts.P1 to P9 marked. MOs 1 to 6 were 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. The court below considerably influenced by the evidence of PW3 and Ext.P3 mahazar, came to the conclusion that the prosecution has succeeded in establishing the case against the accused and found him guilty. Conviction and sentence followed.

9. Assailing the conviction and sentence, the learned counsel appearing for the appellant contended that even though the contraband articles were seized on 26.02.2002, they were produced before court only after two months and no satisfactory explanation is offered for the delay. For the above proposition, the learned counsel relied on the decision reported in **Ramankutty v. Excise Inspector, Chelannur Range** (2013 (3) KHC 308). That itself should prove fatal to the prosecution. It is further contended that there is no evidence worth the name to come to the conclusion that the

property from where the articles were seized in fact belonged to the accused or the accused had absolute control over the same. Ext.P2, the certificate issued by the Village Officer is insufficient to show that the accused is in possession of the property. At the time of detection, there was nobody present in the house. Therefore, it is incumbent on the part of the prosecution to establish that the house belonged to the accused and he had control over the same. There is no such evidence in the case on hand and therefore, liability cannot be fastened on the accused.

10. The learned Public Prosecutor on the other hand pointed out that the evidence of PW3 is so clinching enough and gets support from Ext.P3 mahazar, the contemporaneous document and Ext.P9, certificate showing the ownership is sufficient to show that the house belonged to the accused and the contraband article was in possession of the accused. The court below has analysed the evidence in considerable detail and has come to the right conclusion.

No grounds are made out to interfere with the conviction and sentence passed by the court below.

11. The evidence regarding detection remains confined to the testimony of PW3. He would say that while working as S.I. of Police, Vellathooval, he had occasion to receive information regarding the illegal activities carried on by the accused in his property. He speaks about having gone to the place and also recovered various articles from the place. He speaks about the sampling, labelling and sealing of the respective articles and the preparation of Ext.P3 mahazar. He prepared Ext.P5 property list and also the forwarding note, Ext.P6. Even though he was cross examined at length, nothing could be brought out in his evidence to show that he is speaking falsehood. Ext.P3 mahazar also narrates in detail what transpired at the place of incident and it corroborates the evidence of PW3.

12. As far as the delay is concerned, of course, there is a delay of two months in producing the articles before the

court. PW3 has stated that it was due to the strike of the employees, he could not produce the articles before court within the time. Even though the contraband articles seized were produced, due to NGO strike, the articles were not accepted and returned it to keep until further orders. It is however stated that he had the custody of the articles till they were produced before court.

13. There is yet another significant aspect and that is, the accused was not arrested from the place where the detection was made. Heavy reliance was placed by the prosecution on Ext.P9 document to show that the house belonged to the accused. It is no doubt true that PW5 says that he issued Ext.P9 certificate to show that the accused is the owner of the building. It is interesting to note that Ext.P2, a certificate issued by the Village Officer contains no materials whatsoever to show that the house belonged to the accused. It is not discernible from the evidence of PW5 and from Ext.P9, that the house belonged to the accused

and the accused had absolute control over the same. The basis for saying that the house belonged to the accused is not seen stated. There is want of evidence to show that the accused was the actual custodian or he had control over the contraband article. For the above reasons this appeal will have to succeed.

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

Sd/-
P.BHAVADASAN
JUDGE

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P.A. to Judge