

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 12TH DAY OF OCTOBER 2015/20TH ASWINA, 1937

CRL.A.No. 240 of 2007 ()

**AGAINST THE JUDGMENT IN SC 1212/2005 of ADDITIONAL SESSIONS COURT FAST
TRACK-II, PALAKKAD DATED 06-01-2007**

APPELLANT(S)/ACCUSED::

**VESUKUTTAN @ RAMANKUTTY,
AGED 42 YEARS, S/O.CHAMI, KANNERIKUNDIL VEEDU
PALLIPARA, THADUKKASSERRY DESOM, KERALASSERRY VILLAGE
VADASSERRY, PALAKKAD TALUK.**

**BY ADVS.SRI.N.RAGHURAJ
SRI.A.V.RAVI
SMT.K.AMMINIKUTTY**

RESPONDENT(S)/COMPLAINANT/STATE::

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

BY PUBLIC PROSECUTOR SRI. C.K. JAYAKUMAR

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 12-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 240 of 2007

Dated this the 12th day of October, 2015

J U D G M E N T

The accused, who was prosecuted for the offences punishable under Section 55(a) read with Section 8(2) of the Abkari Act, was found guilty of the same. He was therefore convicted and sentenced to suffer simple imprisonment for one year and to pay fine of ₹1 lakh with a default clause of three months. Set off as per law was allowed.

2. The incident in this case occurred on 18.01.2003 at about 5.45 p.m.. On that day PW1 along with PW2 and other were on routine patrol duty. When they reached near the Old Post Office in Pallippara, they happened to see the accused coming along the road with a white can of 5 litre capacity. Seeing the excise officials, he became nervous and jittery and that caused suspicion in the minds of the officers. They intercepted him and seized the can. On examination by taste and smell, it was revealed that the contents was arrack. A sample of 375 ml taken was sealed

and labelled containing the signature of the accused, PW1 and the witnesses. The balance quantity was also sealed in the can itself and labelled as stated before. Ext.P1 seizure mahazar was drawn up at the place of occurrence itself. PW1 along with PW2 and others returned to the Excise Range Office with the articles seized, documents and the accused and handed over the same to PW4. PW4 was the Excise Range Inspector at the relevant time. He admits that on 18.01.2003, PW1, after detecting the offence, had entrusted the articles, the accused and the documents to him and he has taken custody of the same. He also says that as per Ext.P3, Crime No. 1/2003 was registered. According to him, the property seized by PW1 was produced along with property list, namely, Ext.P4. He prepared Ext.P6 remand report and the forwarding note is Ext.P5. Investigation was conducted by PW6. He received the chemical examination report, recorded statements of witnesses, completed investigation and laid charge before

court.

3. The court before which the final report was laid, took cognizance of the offences and finding the offences to be exclusively triable by a Court of Sessions, committed the case to Sessions Court, Palakkad under Section 209 of Cr.P.C. after following the necessary procedure. The said court made over the case to Additional Sessions Court, Fast Track-II, Palakkad for trial and disposal.

4. The latter court, on receipt of records and appearance of the accused before the said court, framed charges for the offences punishable under Section 55(a) read with Section 8(2) 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 P8 marked. MO1 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 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. Presumably impressed with the evidence of PWs 1 and 2 and the fact that the contemporaneous document Ext.P1 contained all the necessary details and according to the court, the prompt production of the accused and articles before court made the prosecution case credit worthy and on that basis found the accused guilty. Conviction and sentence followed.

9. Assailing the conviction and sentence, the learned counsel for the appellant contended that there is a serious flaw in the finding of the court below. Admittedly, the crime was detected on 18.01.2003 on which date the seizure was made. Going by the evidence of PWs 1 and 4, it is clear that PW1 had entrusted the articles, the accused and the

documents to PW4 on the same day itself. This fact spoken to by PW1, according to the learned counsel, is confirmed by PW4 also. However, it is seen from the records that the properties which were seized on 18.01.2003 reached the court only on 24.01.2003. The learned counsel pointed out that PW4 says that he had forwarded the same on the very next day itself and the delay might have been caused in the court. The learned counsel then drew the attention of this Court to the evidence of PW6, who is the Investigating Officer. According to him, from the day on which PW1 entrusted the articles and the documents to PW4 till it was produced before court, they remained in the custody of PW4 himself. This incongruity in the evidence of PW4 and PW6 has been overlooked by the court below and there is no evidence to show as to in whose custody the property was from 19.01.2003 to 24.01.2003, the date on which the endorsement of the court shows that it was received in court. The unexplained delay is fatal to the prosecution and

for the said purpose, the learned counsel relied on the decision reported in **Ramankutty v. Excise Inspector, Chelannur Range** (2013 (3) KHC 308). Accordingly it is contended that on this sole ground, the appellant is entitled to succeed.

10. The learned Public Prosecutor very vehemently tried to support the finding of the court below and pointed out that the court below has considered this aspect in detail and has come to the conclusion that no prejudice has been caused to the accused. The court below was inclined to accept the statement of PW4 that the properties were produced before court on 19.01.2003 itself.

11. It is difficult to accept the contention of the learned Public Prosecutor and so also the finding of the lower court in this regard. Admittedly, the detection of the offence was on 18.01.2003. PWs 1 and 2 are the two officers who had gone along with other officers on patrol duty during the course of which crime was detected. PWs 1

and 2 give a uniform and consistent version of the incident regarding the detection, sampling and seizure of articles. It is also clear from their evidence that Ext.P1 mahazar was drawn and arrest memo was also prepared. The evidence of PW1 is clear to the effect that after having detected the offence, he along with the officers returned to the Excise Range Office and handed over the articles, the accused and the documents to PW4.

12. PW4 does not dispute the above fact. He admits that on 18.01.2003, in the evening, he was handed over the records, the accused as well as the material objects seized by PW1 on 18.01.2003. He then goes on to say that on the very next day itself, he had forwarded the articles to the court, but he is unable to give reason as to why the endorsement of the court shows that it was received only on 24.01.2003. He speculates that it might have been due to some fault on the part of the court.

13. The above explanation offered by PW4 seems to

have been readily accepted by the court below. It is difficult to understand how it could be so in the light of the evidence furnished by PW6, the Investigating Officer. PW6, the Investigating Officer is definite that after the articles were handed over by PW1 to PW4 on 18.01.2003, till it was produced on 24.01.2003 before the court, it was in the custody of PW4, the fact which is disputed by PW4. He disowns the custody of the articles from 19.01.2003 to 24.01.2003. That means there is nothing to show as to who had the custody of these articles from 19.01.2003 to 24.01.2003.

14. This Court is not forgetful of the fact that the word 'forthwith' made mention of in Section 102 of the Cr.P.C. does not mean 'immediately'. But the Division Bench had occasion to observe that it does not mean that there can be delay in producing the records and the articles. If there is any delay, that has to be properly explained. This aspect with reference to the Abkari Act is specifically considered in

the decision referred to by the learned counsel for the appellant. After evaluating the facts of the case and also relying on the earlier decision, this Court held that unexplained delay in producing the contraband before the court after seizure is fatal to prosecution case.

15. The unexplained delay in lodging the complaint and more significant than that, the inability on the part of the prosecution to show as to in whose custody the property was from 19.1.2003 to 24.01.2003 should prove fatal to the prosecution.

For the above reasons, this Court is unable to sustain the conviction and sentence passed by the court below. This appeal is allowed. The conviction and sentence are set aside and the accused stands acquitted of the charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

Sd/-
P.BHAVADASAN
JUDGE

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