

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 2ND DAY OF DECEMBER 2015/11TH AGRAHAYANA, 1937

CRL.A.No. 721 of 2006 ()

**AGAINST THE JUDGMENT IN SC 80/2005 of ADDITIONAL DISTRICT & SESSIONS
COURT FAST TRACK (ADHOC)-II, KOZHIKODE DATED 03-03-2006**

APPELLANT(S)/ACCUSED NO.2:

**PRADEEP, S/O.PUSHPA,
PERINGOTTU, CHANDRAKANTHAM, KIDAVUR AMSOM
CHAMAL DESOM, KOZHIKODE DISTRICT.**

BY ADV. SRI.SUNNY MATHEW

RESPONDENT(S)/COMPLAINANT:

**THE STATE OF KERALA,
THROUGH THE EXCISE INSPECTOR
THAMARASSERY EXCISE RANGE
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA
ERNAKULAM.**

BY PUBLIC PROSECUTOR SMT. S. HYMA

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 02-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 721 of 2006

Dated this the 02nd day of December, 2015

J U D G M E N T

Among the two accused, as the first accused absconded initially, the appellant, who is the second accused, stood trial for the offence punishable under Section 55(a) of the Abkari Act. He was found guilty. He was therefore convicted and sentenced to suffer rigorous imprisonment for two years and to pay a fine of ₹1 lakh with a default clause of simple imprisonment for a further period of three months. Set off as per law was allowed.

2. The incident in this case occurred on 23.05.2000. On that day PW1, the Excise Preventive Officer attached to Thamarassery Excise Range Office along with other officers, at about 2.30 in the afternoon, had set out on patrol duty. When they reached near the house of one Samikutty, they happened to see the first accused pouring some liquid from a 10 litres capacity can into a 5 litres capacity can held by

the second accused. The excise party approached them and cans were seized. 10 litres can was found to contain 3 litres of arrack and 5 litres can was found to contain 2 litres of arrack. They confirmed that it was arrack by smell and taste. From each of the cans, a sample of 180ml was taken in two different bottles and samples were separately sealed and labelled. The seizure mahazar was prepared at the spot and that is Ext.P1. Ext.P3 is the arrest memo prepared by him. PW1 returned to the office and on the basis of records and materials available before him, he registered Crime No. 8/2000 as per Ext.P4 occurrence report. Both the accused were produced before court. PW5 took over investigation of the case. He had the property produced before court as per Ext.P7 property list. He prepared Ext.P8 forwarding note and had the samples sent for chemical analysis and obtained Ext.P9 report. PW4, who succeeded PW5, 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 offence and finding the offence to be exclusively triable by a Court of Sessions, committed the case to Sessions Court, Kozhikode under Section 209 of Cr.P.C. after following the necessary procedures. The said court made over the case to Additional District and Sessions Court, Fast Track (Adhoc)-II, Kozhikode, for trial and disposal.

4. The latter court, on receipt of records and appearance of the second accused before the said court, framed charge for the offence punishable under Section 55 (a) 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 and 2 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. Accepting the evidence of PWs 1 and 3 regarding detection, sampling and sealing etc. and also based on the contemporaneous document Ext.P1 and also the fact that the accused was promptly produced before court, the court below came to the conclusion that the offence has been made out and accordingly, the conviction and sentence of the second accused as already mentioned followed.

9. Assailing the conviction and sentence, the learned counsel for the appellant contended that there is a delay of one day in producing the materials before court and it is not clear from the evidence on record as to who was in custody of the same during that period. Referring to Exts. P8 and P9, it was pointed out that in the forwarding note, the two samples are labelled as sample No. 'A' and 'B', whereas in

the Chemical Analysis Report produced as Ext.P9, the two samples are shown as items '1' and '2'. A reasonable doubt is created as to whether the sample analysed in the laboratory is the sample sent from the court or is the sample taken from the contraband articles alleged to have been seized from the possession of the accused persons. Further, the learned counsel for the appellant relying on the decision reported in **Sivadasan v. State of Kerala** (2007 (2) KLJ 328), **Darshan Singh v. State of Punjab** (1997 (1) Crimes 577), contended that when questioned under Section 313 Cr.P.C., the court below did not put the contents of the Chemical Analysis Report to the accused, which is one of the most incriminating circumstance relied on by the court below for convicting the accused and failure to do so, vitiates the conviction.

10. The learned Public Prosecutor on the other hand contended that the evidence of PWs 1 and 3 are cogent and convincing enough when taken along with Ext.P1 mahazar,

which is a contemporaneous document containing the entire details and there is no reason to doubt the version given by the prosecution. The forwarding note contained the sample seal and the Chemical Analysis Report shows that the sample seal forwarded tallied with the seal found on the sample bottle sent for analysis. Thus, there is no infirmity in the report and the appeal is only to be dismissed.

11. After having heard the learned counsel on both sides and after having perused the records, it is difficult to accept the contentions raised by the learned Public Prosecutor. Even though the complaint regarding delay may have no substance, the other contentions seems to be substantial.

12. It may be remembered that PWs 1 and 3, the Excise Preventive Officer and the Excise guard, had gone on patrol duty on the day of incident and both of them give a uniform version about the detection of the offence, sampling done and affixing of labels on the samples and the

contraband article. They also say about having arrested the accused and PW1 says about having returned to the office and registered crime on the basis of the materials available to him. The accused were produced on the very same itself before the court. The evidence of PW5 shows that the property was produced only on the next day and as rightly pointed out by the learned counsel for the appellant, no one knows the custody of the article during that one day period. However, 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 before the court after seizure is fatal to prosecution case.

13. It is no doubt true that in the above decision, it was held that even a day's delay can be fatal. But that must be confined to the facts of the said case. One has to remember in this case that the accused was produced soon after the detection of the offence and Ext.P1 mahazar contains all the details and other circumstances and it is

difficult to believe that the documents could have been fabricated or manipulated. But there is considerable force in the submission made by the learned counsel for the appellant that there is a possibility of the sample having been changed before sending it to the chemical analysis laboratory. In the forwarding note Ext.P8, the samples are shown as sample 'A' and 'B' whereas, in Ext.P9 Chemical Analysis Report they are shown as item No. '1' and '2'. There is no explanation offered by the prosecution as to how sample A and B became Item No. 1 and 2. This anomaly glares at the face of the prosecution. There is a reasonable doubt created regarding the question as to whether the samples analysed are the samples taken from the contraband articles possessed by the accused persons.

14. Equally significant is the contention that when questioned under Section 313 Cr.P.C. the contents of the Chemical Analysis Report was not put to the accused.

15. In the decision reported in **Sivadasan v. State of Kerala** (2007 (2) KLJ 328), it was held as follows:

“Apart from this, this Court to see that though the appellant had denied the prosecution case when he was examined under Section 313, the trial court had not put the contents of Ext.P8 chemical report to him and that report shows that the sample analysed was arrack. The only question put to him is that “Ext.P8 പരിശോധനാ റിപ്പോർട്ട് സംബന്ധിച്ചോ മറ്റു രേഖകളെ സംബന്ധിച്ചോ വല്ലതും പറയാനുണ്ടോ?. He answered ഇല്ല. The accused has got a right to get clear the evidence regarding the circumstances proved against him by the prosecution when he was questioned under Section 313. If such a right is infringed, the prosecution could not succeed to prove the case against such accused.”

16. In the decision reported in **Darshan Singh v. State of Punjab** (1997 (1) Crimes 577), it was held as follows:

“It was vehemently argued by the learned counsel for the State that a heavy quantity of opium was recovered from the petitioner and, as such, on technical ground he is not entitled to acquittal. He submitted that the case may be sent back to the trial Court to rectify that irregularity by re-examining the accused under Section 313, Code of Criminal Procedure. No doubt, the course suggested by the learned counsel for the State of course can be adopted but the facts and circumstances of the case go to show that if such a course is adopted that would not advance the ends of justice. In the instant case recovery of opium is alleged to

have been effected on November 16, 1982. The trial court took about 3 years and 8 ½ months in concluding the trial and the appeal filed by the petitioner was dismissed by the Additional Sessions Judge vide his judgment, dated March 25, 1987. he preferred the present Revision Petition as far back as in the year 1987 and it has come up for hearing on September 27, 1996. Thus he has already suffered the agony of long-drawn litigation for a period of a little less than 14 years. If the case is remanded at this stage, that would further add to his agony."

17. Similar to the case referred to above, in this case also except for putting to the accused that the Chemical Analysis Report has been received, there was no specific question regarding the contents of the Chemical Analysis Report. There is nothing to show that the contents were put to the accused and his explanation had been sought for. It is to be remembered that it is one of the most vital items of evidence relied on by the prosecution. It is well settled that when such an item is not put to the accused, it cannot be relied on. It cannot be also said that by non-disclosure of contents of the Chemical Analysis Report to the accused, no prejudice is caused to him because, conviction is mainly

based on the Chemical Analysis Report also. If that be so, necessarily the prosecution has to fail.

For the above reasons, 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