

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 11TH DAY OF DECEMBER 2015/20TH AGRAHAYANA, 1937

CRL.A.No. 730 of 2006 ()

AGAINST THE JUDGMENT IN SC 66/2004 of ADDL.SESIONS JUDGE,
FAST TRACK COURT-II, ALAPPUZHA DATED 04-03-2006

(CP 83/2003 of J.M.F.C.-I, ALAPPUZHA)

APPELLANT(S)/ACCUSED: :

THANKAPPAN, S/O. KUTTAPPAN,
AGED 47 YEARS, MADATHIL VELIYIL VEEDU, NO.778
WARD NO.13, MANNANCHERRY PANCHAYATH
KOMALAPURAM VILLAGE, ALAPPUZHA DISTRICT.

BY ADVS.SRI.S.SANAL KUMAR
SMT.BHAVANA VELAYUDHAN

RESPONDENT(S)/COMPLAINANT: :

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

BY PUBLIC PROSECUTOR SMT.LILLY LESLIE.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 11-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ami/

P.BHAVADASAN, J.

Crl.A.No.730 of 2006

Dated this the 11th day of December, 2015.

J U D G M E N T

The accused was prosecuted for the offence punishable under Sections 8(1) and (2) of the Abkari Act and having found guilty, the court below convicted him and sentenced him to undergo rigorous imprisonment for 2 years and to pay a fine of Rs.1 lakh and in default, to undergo 3 months rigorous imprisonment.

2. The incident which gave raise to this case occurred on 9.6.2001. On the relevant date, PW1 was functioning as the Excise Circle Inspector of Excise Enforcement and Anti Narcotic Special Squad, Alappuzha. He received reliable information about the illegal activity being carried on by the accused. He prepared a search memo and sent it to the court and proceeded to the place of occurrence. The accused was found engaged in the act of distillation. A liquid was found by the side of the accused and by taste and

smell, it was identified as arrack. On the north-eastern corner side of the house, they could spot a can of 10 ltr. capacity containing 8 ltrs. of arrack. That was also confirmed by taste and smell. Apart from these articles, in a can of 50 ltr. capacity, they were able to detect 35 ltrs. of wash. PW1 says that he took a sample of 200 ml. in a bottle of 300 ml. capacity, from the liquid contained in the black can. From the wash also, 500 ml. sample was taken. All the samples were sealed and labelled and the label contained the signatures of the accused, the witnesses and PW1. Ext.P1 mahazar was prepared and Ext.P2 is the search list. The search memo prepared by him was sent to the court by Ext.P3. Ext.P4 is the arrest memo. PW1 would say that he handed over the accused, the contraband article and the records to the Excise Range Office, Alappuzha. PW7 was the Excise Inspector attached to Alappuzha Excise Range Office. On 9.12.2001, according to him, the accused along with the seized articles were produced before him and on that day,

he had registered Crime No.14/2001 as per Ext.P10 occurrence report. The accused and the articles were produced on the very same day. The property list is Ext.P11 and requisition for chemical analysis, ie., the forwarding note, is Ext.P12. PW5 took over the investigation as per the direction of the Assistant Excise Commissioner and recorded the statement of the witnesses. His successor in office, PW6, obtained possession certificate of the premises from where the articles were seized and completed the investigation and laid charge before the court.

3. The court before which the final report was laid, took cognizance of the offence and on finding that the offence is exclusively triable by a court of Sessions, committed the case to the Sessions court, Alappuzha, which court made over the case to the Additional District and Sessions court for trial and disposal.

4. The latter court, on appearance of the accused and on receipt of documents, framed charge for the offence

punishable under Sections 8(1) and (2) of the Abkari Act. The accused pleaded not guilty to the charges and claimed to be tried. The prosecution therefore examined Pws.1 to 7 and Exts.P1 to 12 were marked. Mos.1 to 7 were identified and marked. After closing of the prosecution evidence, the accused was questioned under Section 313 of Cr.P.C. He denied all the incriminating circumstances brought out in evidence and maintained that he is innocent. On finding that he could not be acquitted under Section 232 of Cr.P.C., he was asked to enter on his defence and Dws.1 and 2 were examined from the defence side.

5. The court below, influenced by the evidence of Pws.1 and 2 and also the fact that Ext.P1 mahazar prepared on the spot contains a detailed description of what transpired at the place of occurrence, thereby giving a credence to oral evidence by Pws.1 and 2, and that the accused and the contraband article were produced on the very same date before the Magistrate, the court below was

inclined to hold that the prosecution has succeeded in establishing the case against the accused and therefore found him guilty, and convicted and sentenced him as already mentioned.

6. Assailing the conviction, the learned counsel appearing for the appellant contended that the court below has not critically analysed the evidence on record and has simply accepted the evidence given by Pws.1 and 2. The independent witnesses have turned hostile and therefore the prosecution has to depend upon the testimony of official witnesses. There is no independent and corroborative evidence to support the prosecution evidence, as it will hazard the findings on the basis of evidence of Pws.1 and 2. It is pointed out there was a delay in producing the contraband article before the court.

7. The learned Public Prosecutor on the other hand has vehemently contended that the evidence of Pws.1 and 2 would clearly show that the detection was proper and legal

and there is no infirmity attached to the same. There is no case for the accused that Pws.1 and 2 were incompetent to detect the offence. If Ext.P1 mahazar, which is prepared simultaneously at the time of detection, contains all the details regarding the detection. It is too farfetched to contend that it is a fabricated or concocted document. Further, the production of the accused and the contraband article before the Magistrate on the very same date of the incident itself, fortifies the case of the prosecution that the detection was as alleged by them. The lower court has analysed the evidence and considered it in detail and chosen to accept the evidence produced by the prosecution and there is nothing to show that the findings are perverse or are based on irrelevant materials. No interference is therefore called for in the conviction and sentence.

8. After having heard the learned counsel appearing for the appellant and the learned Public Prosecutor, and having perused the records, it becomes necessary to observe

that there is considerable force in the submissions made by the learned Public Prosecutor. True, the evidence regarding the detection stands confined to the testimony of Pws.1 and 2 only. The two independent witnesses, who are examined as Pws.3 and 4, though admit their signatures on the mahazar, had denied having seen the actual seizure and stated that they put their signatures on it, elsewhere.

9. Pws.1 and 2 gave a consistent and cogent version regarding the incident. They deposed about the information having been received which led them to the house of the accused and had deposed that they actually saw the accused engaged in the act of distillation. They seized the articles found in the house and the wash also. They collected samples of the articles seized by them and the samples were sealed and labelled as per law. Pws.1 and 2 compliment each other and there is nothing in the evidence to show that they are not speaking the truth. Though they were cross examined at length, nothing was brought out to impeach

their evidence. Moreover, there is nothing to show that they had any oblique motive or that they had a reason to falsely implicate the accused.

10. Coming to the contention based on the independent evidence, it has to be said that it is without much force. As already stated, that the independent witnesses had turned hostile ; but that does not mean that the evidence of Pws.1 and 2 cannot be accepted. It is by law well settled that, if the evidence of the Police officer or such other person is convincing, cogent and if it contains the ring of truth, then nothing will prevent the court from accepting that evidence to enter into a finding on that basis. In such circumstances, it would be imprudent on the part of the court to insist for contradiction. After all, contradiction is only a matter of prudence and not a rule of law. Therefore, merely because Pws.3 and 4 - the two independent witnesses, have chosen to betray the prosecution, that does not mean that the evidence of Pws.1 and 2 is to be discarded. There is nothing

established to show that their evidence is tainted.

11. Again, it is not as if that there is no corroboration to the testimony of Pws.1 and 2. Corroboration, if at all any is necessary is furnished by Ext.P1 mahazar, which is a simultaneous contemporary document drawn up, containing all the details spoken to by Pws.1 and 2 and it is drawn up at the place of incident itself and it is promptly produced before the court. It is too much to believe that such a document would be concocted or a fabricated one.

12. Pws.1 and 2 have also spoken about the sampling done by them and the chemical analysis report shows the results. The sample seals are also produced and it tallies with the seal found in the samples sent for chemical analysis.

13. Therefore, the mere fact that the two independent witnesses did not support the prosecution, is not a ground to discard the evidence of Pws.1 and 2. As rightly noticed by the court below, the prompt production of the accused,

contraband article and the documents on the date of incident itself, further adds trustworthiness of the prosecution witnesses and further there is nothing to show that Pws.1 and 2 had any ill will to forcibly implicate the accused in the incident.

14. The above facts led the lower court to come to a conclusion that the accused is guilty of the offence alleged against him. It cannot be said that the findings are perverse or are based on irrelevant materials. The findings seem to be just and proper. Even assuming that a different view is possible, this Court will not be justified in interfering with the findings of the court below.

15. In the above facts and circumstances of the case, the conviction for the offence under Sections 8(1) and (2) of the Abkari Act has only to be upheld and I do so.

16. Faced with the above situation, the learned counsel appearing for the appellant pointed out that the sentence imposed is disproportionate to the offence and lapse of time

must have some impact on the sentence. The quantity seized also should be taken into consideration and so also the age of the accused. Considering these factors, it is contended that the sentence now imposed is on the higher side and some leniency may be shown in this regard.

17. Though wash, arrack and distilling utensils have been recovered from the house of the accused, the fact remains that 15 years have been lapsed since the detection occurred in this case and hence passage of time must have some impact. To restore the sentence awarded will necessarily be to upset the settled position. But that doesn't mean that the offence can be taken lightly, whoever be responsible for the inordinate delay in disposing of the matter. However, there is nothing to show that the accused had criminal antecedents or that after going on bail he had engaged in similar activities. If that be so, some leniency is certainly due to him.

18. Thus while confirming the conviction under Sections 8(1) and (2) of the Abkari Act, the sentence imposed by the court below is set aside and the accused is sentenced to und ergo rigorous imprisonment for 6 months and to pay a fine of Rs.1 lakh and in default to undergo rigorous imprisonment of 3 months. Set off as per law is allowed.

Sd/-
P.BHAVADASAN,
JUDGE.

ami/16/12/15

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P.A. to Judge