

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 22ND DAY OF DECEMBER 2015/1ST POUSHA, 1937

CRL.A.No. 791 of 2006 ()

**AGAINST THE JUDGMENT IN SC 330/2005 of ADDITIONAL SESSIONS COURT/ SPECIAL
COURT FOR NDPS ACT, THODUPUZHA**

APPELLANT(S)/ACCUSED NOS.1 TO 6::

- 1. MATHEW @ JOY
KOVINCHICKAL HOUSE, PAYYAMBILLI KARA
PAYYAMBILLI VILLAGE,
MANANTHAVADY TALUK, WAYANAD DISTRICT.**
- 2. PRASAD S/O. MADHAVAN,
THACHILARIKANDI HOUSE, NARAVOOR KARA
KOOOTHUPARAMBU VILLAGE, KANNOOR DISTRICT.**
- 3. MANOJ S/O. KESAVAN, IRUMPUKUZHI HOUSE,
VANNAPPURAM KARA, VANNAPPURAM VILLAGE.**
- 4. PRABHAKARAN S/O. PONNUPILLA,
10 MURI LAYAM, NYMAKAD ESTATE, KDH VILLAGE.**
- 5. JACOB ABRAHAM S/O. ABRAHAM,
PANACHAMOOTTIL HOUSE, PAYIPPADU KARA
PAYIPPADU VILLAGE, KOTTAYAM DISTRICT.**
- 6. KUMAR S/O. MADASWAMY, 10 MURI LAYAM,
KURUMALA DIVISION, NALLATHANNY ESTATE, KDH VILLAGE.**

**BY ADVS.SRI.P.VIJAYA BHANU (SR.)
SRI.L.RAJESH NARAYAN
SRI.RENJITH B.MARAR**

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 22-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 791 of 2006

Dated this the 22nd day of December, 2015

J U D G M E N T

The accused six in numbers were prosecuted for the offences punishable under Sections 55(a) and 55(i) of the Kerala Abkari Act. After trial, they were found guilty. They were therefore convicted and sentenced to suffer simple imprisonment for five years each and to pay a fine of ₹2 lakhs each with a default clause of simple imprisonment for one year each. Set off as per law was allowed.

2. The prosecution story runs thus:

PW1 was at the relevant time working as the Additional Sub Inspector attached to Munnar Police Station. On 8.11.2002, according to the prosecution case, while PW1 was in his office, he received reliable information that in two cars, the details of which are given by PW1, spirit is being transported. PW1 set out with his officers and began to check vehicles near a tea factory at Marayoor. A vehicle bearing registration No. KL6 B 577 came along the way.

That vehicle was brought to a halt and the driver disclosed his name as Mathew. It is stated that he was piloting a vehicle in which spirit was being transported. Soon, another vehicle followed the vehicle driven by Mathew and that was also stopped. The driver disclosed his name as Prasad. When that vehicle was inspected, on the left side of the driver's seat it was found to carry 14 cans of 35 litres each. Another 10 cans each with a capacity of 35 litres were detected from the further rear side of the vehicle. One of the cans was opened and on identification, it was realized that it was spirit. Four samples of 200 ml each were drawn up and they were numbered as S1, S2, S3 and S4. Two sets of spirits in 35 litres cans were recovered from two different places in the same car. PW1 claims to have drawn up Ext.P1 mahazar. The arrest memo prepared is Ext.P2. PW1 claims to have taken vehicles into custody. He returned to the Station and registered crime No. 209/2002 and as per Ext.P4 FIR, crime was registered for the offences punishable under

Sections 55(a) read with Section 34 of IPC. Further investigation was done by PW6. PW6 took over investigation on 09.11.2002 i.e. on the next day of detection of the offence. He recorded statements of witnesses and he would say that he prepared the list of properties to be produced before court and that is Ext.P8. He would say that till the samples were produced before court, they were in his custody. It is interesting to note that PW6 says that he gave letters to the concerned authority to disclose the names of the registered owners and that were disclosed and what happened to them is not discernible from the records. 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 offences 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 Act), Thodupuzha 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 Sections 55(a) and 55(i) 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 7 examined and had Exts.P1 to P14 marked. MO1 series were got identified and marked.

6. After the close of prosecution evidence, the accused was questioned under Section 313 Cr.P.C. They denied all the incriminating circumstances brought out in evidence against them and maintained that they are innocent.

7. Finding that they 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. The court below, presumably impressed with the evidence of PWs 1 and 5, the two persons, who are instrumental in detecting the offence and also the contents of Ext.P1 mahazar and also the production of the accused before the court promptly, came to the conclusion that the evidence adduced is sufficient to show the involvement of the accused and the offences have been made out against the accused. Conviction and sentence as already mentioned followed.

9. Sri. Vijayabhanu, the learned senior counsel appearing for the appellants contended that the court below has overlooked certain vital aspects in the case. The detection was on 08.11.2002 and from Ext.P8 property list produced before court, it can be seen that the samples were produced only on 07.02.2003. Of course, PW6 says that during the period, he had custody of the articles. But surprisingly enough, the learned senior counsel pointed out that no explanation is offered for the delay. Referring to the

decision reported in **Ramankutty v. Excise Inspector, Chelannur Range** (2013 (3) KHC 308), it is submitted that unexplained delay is fatal to the prosecution in such cases. The learned senior counsel also pointed out that it is surprising to note that the contraband articles, after taking the samples, which according to PW1, were sealed and labelled, had not been produced before court and no explanation is offered as to why they are not produced. It is significant to notice, according to the learned counsel, that the property list also does not contain the description of those contraband articles. The learned senior counsel went on to point out that even assuming that the officers concerned could have destroyed the contraband articles, they could have done it only by following the procedure under Section 53A of the Abkari Act. That has not been followed in the case on hand and that too adds to the agony of the prosecution. These aspects have been lost sight of by the court below and the court below has mechanically acted

on the evidence furnished by PWs 1 and 5 and found the accused guilty.

10. The learned Public Prosecutor pointed out that the evidence of PWs 1 and 5 are clinching and convincing and there is no motive attributed to them as falsely implicating the accused. There is no reason to disbelieve them and the detection is properly proved. Of course, there is some delay in producing the property before court. But according to the learned Public Prosecutor, no prejudice has been caused to the accused. Similar contention is taken with regard to the non production of contraband articles which are said to have been sealed and labelled by PW1. The learned Public Prosecutor pointed out that at any rate, the court below has found the evidence of PWs 1 and 5 to be sufficient to prove the accused guilty and there is no justification for taking a different view.

11. If one was merely concerned with the detection of contraband articles, probably, one could say that the

evidence of PWs 1 and 5 are sufficient. But to constitute an offence, one has to travel far beyond that. One may recall here that the charges levelled against the accused are under Sections 55(a) and 55(i) of the Abkari Act. That contemplates certain ingredients to be proved by the prosecution before the accused can be held guilty.

12. As to what happened to the contraband articles which were labelled and sealed, according to PW1, after taking the samples, there is absolutely no evidence in this case. If one is to presume that the Abkari Officers concerned had destroyed the contraband articles, they could have done so only after following the procedure under Section 55A which has been brought into force with effect from 03.09.2002. Till then what is to be done was after the production of the contraband articles, it used to be returned to the Police Officers or the Excise Officers as the case may be, to produce at the time of trial. Quite often, they never appear again. It was to get over that difficulty, Section 53A

was introduced into the Abkari Act to see that proper inventory is taken and it is certified by the duly authorised person so that there can be no dispute regarding the contraband seized from the possession of the accused. No such exercise has been undertaken in the case on hand.

13. 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.

14. In the case on hand, as already noticed, the detection was on 08.11.2002 and the samples were produced only on 07.02.2003. Apart from the fact that the balance contraband has not been produced, there is no explanation offered as to why such delay was caused in producing samples before court. The Division Bench of this Court had occasion to hold that the word 'forthwith' does not mean immediately, it only means within a reasonable time and in case there is delay, it has to be properly explained.

No explanation whatsoever is offered or none is attempted by PW6. If this has to be viewed in the light of the fact that the rest of the contraband articles which are alleged to have sealed and labelled are not also produced and there is absolutely no information as to what happened to that commodity.

15. In the light of the unexplained delay, it will be quite unsafe to convict the accused on the basis of the chemical analysis report.

For the above reasons, this appeal is allowed. The conviction and sentence passed by the court below are set aside and the accused stand acquitted of all charges levelled against them. Their bail bond shall stand cancelled and they are set at liberty.

Sd/-
P.BHAVADASAN
JUDGE

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P.A. to Judge