

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 1ST DAY OF OCTOBER 2015/9TH ASWINA, 1937

CRL.A.No. 813 of 2006 ()

**AGAINST THE JUDGMENT IN SC 192/2002 of ADDITIONAL SESSIONS COURT
(ADHOC)-II, KALPETTA, DATED 09-03-2006**

APPELLANT(S)/ACCUSED::

**C.P. KUMARAN, S/O. KUNHAN,
AGED 48, CHEMATTUPADI HOUSE, KALKUNI
CHEKKADI, THIRUNELLI AMSOM, WYNAD DISTRICT.**

**BY ADVS.SRI.V.RAJENDRAN
SRI.P.SAMSUDIN**

RESPONDENT(S)/COMPLAINANT::

**STATE OF KERALA,
REPRESENTED BY THE SUB INSPECTOR OF POLICE
THIRUNELLI THROUGH THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.**

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 01-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 813 of 2006

Dated this the 01st day of October, 2015

J U D G M E N T

The accused was prosecuted for the offence punishable under Section 55(a) of the Abkari Act and was found guilty. He was convicted and sentenced to suffer simple imprisonment for a period of one year and to pay fine of ₹ 1 lakh, in default of payment of which he is to suffer simple imprisonment for a period of three months.

2. The incident in this case is said to have occurred on 13.05.2000 late in the night. PW6 was the SI of Thirunelli Police Station. He along with PWs 1 and 5 had gone on routine patrol duty and when they reached the place called Kalkkuni, they happened to locate a person by name Prakashan with packets of arrack of Karnataka make and he was arrested. On questioning him, it was revealed that he had obtained the contraband articles from the accused. Therefore, as indicated by Prakashan, PW6 and his team of

officers proceeded to the house of Kumaran and reached there by about 21.40 hrs. in the night. When Kumaran was interrogated, he revealed that behind his house, among the coffee plants, he has stored contraband articles. From beneath the coffee plant, a big shopper was seized. That contains several packets of illicit articles. Four of the packets were opened and on examination it was found to contain arrack. The accused was arrested at 21.45 hrs. and Ext.P3 is the arrest memo. From the four packets, which were opened, samples were taken and they were sealed and labelled and the label contained the signature of the witnesses, PW6 and the accused. The rest of the articles were also seized. PW6 returned to the Police Station and registered crime as per Ext.P4 FIR. The seized articles were produced before court on 03.06.2000 and Ext.P5 is the property list. PW6 stated that till that date, the articles remained in his custody. Since he was under law and order duty, he could not produce the articles before the said date.

Ext.P6 is the forwarding note prepared by him and Ext.P7 is the chemical analysis report.

3. It is not clear from the records that as to who had conducted the investigation, at any rate, it does not appear that investigating officer has been examined in this case. The evidence of PWs 1, 5 and 6 would clearly reveal that somebody else had investigated the case. Whatever that be, after investigation final report was laid.

4. The court before which the final report was laid, took cognizance of the offence. Finding that the offence is exclusively triable by a Court of Sessions, the said court committed the case to the Sessions Court, Kalpetta under Section 209 of Cr.P.C. The said court made over the case to Additional Sessions Court (Ad hoc)-II, Kalpetta, for trial and disposal.

5. The latter court, on receipt of records and appearance of accused before it, framed charges for the offence punishable under Section 55(a) of the Abkari Act to

which the accused pleaded not guilty and claimed to be tried. The prosecution therefore had PWs 1 to 6 examined and Exts.P1 to P7 marked. MO1 to 3 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 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. Relying on the evidence furnished by PWs 1, 5 and 6 and also relying on Ext.P1 seizure mahazar, the trial court found the accused guilty. He was therefore convicted and sentenced as already mentioned.

9. Assailing the conviction and sentence, the learned counsel for the appellant pointed out that labelling and sampling of the articles were done by PW6 is not in

accordance with law and there is no guarantee that the articles produced before court are the articles seized from the possession of the accused. The learned counsel elaborated on this aspect by pointing out that PWs 1, 5 and 6 have no case that except for the samples taken, the other articles were sealed and labels were affixed containing the signature of the accused, witnesses and PW6. Therefore, there is no guarantee regarding the authenticity of MOs 1 and 3 produced before the court below. Apart from the above aspect, the learned counsel pointed out that the detection of the offence was on 13.05.2000, whereas the contraband articles were seen produced the court only on 03.06.2000. The explanation offered by PW6, the detecting officer is that he was busy with law and order duty. The learned counsel pointed out that he in his cross examination had admitted that there was no hindrance or obstacle in sending over the articles to the court through any other Police Officer who usually visits the court almost daily. The

learned counsel therefore pointed out that no reasonable explanation has been offered for the delay and if that be so, going by the decision reported in **Ramankutty v. Excise Inspector, Chelannur Range** (2013 (3) KHC 308), the delay should prove fatal.

10. The learned counsel appearing for the appellant then drew attention of this Court to Ext.P6, which is a forwarding note and contended that it does not contain the sample of the seal at all. According to the learned counsel, it is mandatory that the sample of the seal should be affixed to the forwarding note and it should also be available in the copy produced before court. The non-affixing of such a seal is fatal. For the said proposition, the learned counsel relied on the decision reported in **Krishnan v. State** (2015 (2) KLT SN 8). For the above reasons, according to the learned counsel, the conviction and sentence are clearly unsustainable in law.

11. The learned Public Prosecutor on the other hand pointed out that the evidence of PWs 1, 5 and 6 when taken along with Ext.P1, seizure mahazar are sufficient to show that the incident has occurred as alleged by the prosecution. There is no oblique motive suggested to PWs 1, 5 and 6 as to why they should falsely implicate the accused. In the absence of any such suggestion, there is no reason to disbelieve the evidence of PWs 1, 5 and 6. The learned Public Prosecutor went on to point out that at any rate, with all the infirmities pointed out by the learned counsel for the appellant, the court below has chosen to rely on the evidence of PWs 1, 5 and 6 and the contents of Ext.P1 and there is no reason as to why this Court should take a different view. In short the contention is that no interference is called for with the conviction and sentence passed by the court below.

12. It is no doubt true that PWs 1, 5 and 6 give a uniform version of the incident. Among them, PW6 is the

Sub Inspector of Police who says that while on patrol duty along with PWs 1 and 5, they happened to come across a person by name Prakashan who had contraband articles in his possession. It was seized from his possession and while he was questioned, he revealed that he had obtained the contraband articles from the accused. PW6 says that then he along with PWs 1 and 5 proceeded to the house of the accused and the accused revealed that he had hidden the contraband articles among the coffee plants behind his house. PW6 says that the big shopper bag was seized from beneath one of the coffee plants which contained several packets of liquid. Four of them were opened and by taste and smell, it was revealed that it was arrack. PW6 speaks about having seized the articles and also prepared Ext.P1 seizure mahazar. He speaks about having returned to the Police Station with the contraband articles and accused and registered crime as per Ext.P4, FIR. Ext.P5 is the property list prepared by him and Ext.P6 is the forwarding note

prepared by him. Ext.P7 is the chemical analysis report.

13. PW6 gets sufficient support in this regard from the evidence of PWs 1 and 5. It is not disputed that they had accompanied PW6 while on patrol duty and they were witnesses to the seizure.

14. The court below chose the evidence of PWs 1, 5 and 6 sufficient enough taken along with the contents of Ext.P1 to find the accused guilty.

15. The court below omitted to note that the detection was on 13.05.2000 and the articles were produced before court only on 03.06.2000. It is also interesting to note that going by the evidence furnished by PWs 1, 5 and 6, only the samples taken was sealed and labelled and the rest of the articles were not labelled and sealed as is enjoined by law, if PWs 1, 5 and 6 had to admit that there is no authenticity as far as MOs 1 to 3 were concerned which are produced in court, since they did not contain the labels containing the signature of the witnesses, PW6 and the accused.

16. PW6 offers a very curious reason for the non-production of the articles immediately on detection. He says he was busy with law and order duty and he could produce the articles only 03.06.2000. But in his cross examination, it was brought out that almost every day, Police men go from the Police Station to the Court concerned and there was no obstruction or hindrance in entrusting the articles to such an officer for production before court prior to 20 days that had elapsed.

17. The consequences of delay in producing the seized articles before court was considered in detail in the decision reported in **Ramankutty v. Excise Inspector, Chelannur Range** (2013 (3) KHC 308), wherein, it was held that unexplained delay in producing the contraband before the court after seizure is fatal to prosecution case. Here the delay was only of 4 days and the court found that the unexplained delay should prove fatal to the prosecution. In the case on hand, it is nearly 20 days. The explanation

offered by PW6 is far from satisfactory and convincing and it cannot be said that reasonable explanation has been offered for the delay. The principles laid down in the decision referred to applies with all force to the facts of the case.

18. Apart from the above aspect, there is yet another significant aspect to be considered. The forwarding note is marked as Ext.P6. It does not contain the sample seal as is required by law. The consequences of forwarding note not containing the sample seal was considered in the decision reported in **Krishnan v. State** (2015 (2) KLT SN 8). In the said decision, the object and purpose for affixing the sample seal was considered in detail and it was held that the absence of sample seal should prove fatal to the prosecution and that is sufficient for an acquittal.

19. The principles laid down in **Krishnan's** case (supra) applies with all force to the facts of the present case. In the said decision it was held as follows:

“Ext.P5 is a copy of the Forwarding Note

submitted before the court for sending sample for subjecting it to chemical analysis. A specific space is provided in the Forwarding Note for affixing the sample seal. No such sample seal was affixed on Ext.P5. Whether the sample seal was affixed on the original of Ext.P5 sent to the Chemical Examiner? Normally, if the sample seal is not appearing in the copy of the Forwarding Note, in this case it is Ext.P5, it has to be presumed that such sample seal was not affixed on the original Forwarding Note unless proved otherwise. A copy of the Forwarding Note is kept in the office of the court for serving certain purposes. The purposes are evident from the contents of the form of the Forwarding Note itself. They include the quantity and description of the sample drawn from the bulk of the contraband, the details of the case and the space for providing the sample impression of the seal affixed on the sample taken from the bulk of the contraband. Therefore, as already stated, the absence of sample seal in the space provided in the copy of the Forwarding Note is sufficient reason for presuming that the sample seal is not provided in the original Forwarding Note. Of course, this is only a rebuttable presumption. In the case on hand, such presumption has not been rebutted by the prosecution."

20. In the case on hand also, Ext.P6 does not contain the sample seal and there is no reason as to why the above principles should not be applied to the facts of the present case. For the above reason also, the appellant will have to succeed.

21. In the light of the above discussion, this Court is unable to uphold the conviction and sentence passed by the court below. It has to be held that the prosecution has failed to establish the case beyond reasonable doubt and that the accused is entitled to benefit of doubt and he is entitled to be acquitted.

For the above reasons, this appeal is allowed. Conviction and sentence passed by the court below 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