

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 9TH DAY OF DECEMBER 2015/18TH AGRAHAYANA, 1937

CRL.A.No. 816 of 2006 ()

**AGAINST THE JUDGMENT IN SC 289/2005 of ADDL.DISTRICT COURT, FAST TRACK-II,
PALAKKAD DATED 16-03-2006**

APPELLANT(S)/ACCUSED::

**RADHAKRISHNAN, S/O. AYYAVU,
KOVILINGIL VEETIL, THOLANUR, ALATHUR
PALAKKAD.**

**BY ADVS.SRI.SAJAN VARGHEESE K.
SRI.LIJU. M.P
SRI.M.V.BIPIN**

RESPONDENT(S)/COMPLAINANT::

**STATE OF KERALA,
REP. BY EXCISE INSPECTOR, REP.BY PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.**

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 09-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

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P.BHAVADASAN, J.

Crl.A. No. 816 of 2006

Dated this the 09th day of December, 2015

J U D G M E N T

The accused was prosecuted for the offences punishable under Sections 55(a) and 8(2) of the Kerala Abkari Act. He was found guilty. He was therefore convicted and sentenced to suffer rigorous imprisonment for one year and to pay a fine of ₹1 lakh with a default clause of simple imprisonment for a further period of six months. Set off as per law was allowed.

2. The incident which gave rise to this case occurred on 26.02.2001. On that day, PW1 the Preventive Officer attached to Alathur Excise Circle Office along with PW2, who was another Preventive Officer of the same office and other officers of the department were set out for routine patrol duty. When they reached Tholanur Chira, they happened to see the accused coming along with a plastic bag. On seeing the Excise Officials, he tried to turn round and escape.

Feeling suspicious, he was intercepted and the bag in his possession was seized. That bag was found to contain a can having a capacity of 5 litres. The can contained some sort of a liquid. By taste and smell, they identified the liquid as arrack. Informing the accused that he has committed an offence, he was arrested after preparing the arrest memo. PW1 says that the can and the plastic bag were sealed and labelled and the label contained the signatures of the accused and PW1. Ext.P1 is the mahazar prepared at the place of occurrence. PW1 also says that he had taken a sample of 300ml in a bottle of 375ml capacity and the sample bottle and the balance contraband article were also sealed. On them also, labels containing the signatures of the accused and PW1 were affixed. When they were on their way to Kuzhalmannam Range office, the accused escaped from their custody. Even though he was chased, the preventive officers could not apprehend him. He prepared a report regarding the escape of the accused before the Excise

Circle Inspector, Alathur and then entrusted the seized articles along with the records prepared on the spot to the Excise Range Office, Kuzhalmannam. Ext.P3 is the report prepared by him regarding the escape of the accused. Ext.P4 is the crime and occurrence report. Property list is marked as Ext.P5 and Ext.P6 is the forwarding note containing the specimen seal. PW5 took over investigation. He recorded statement of witnesses and prepared Ext.P7 site plan. He obtained Ext.P8 Chemical Analysis Report, 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, Palakkad under Section 209 of Cr.P.C. after following the necessary procedures. 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 Sections 55(a) and 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 5 examined and had Exts.P1 to P8 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. The court below, accepting the evidence of PWs 1 and 2 and also Ext.P1 contemporaneous document contains all the details coupled with the Chemical Analysis Report,

reached the conclusion that the prosecution has established its case. Consequently, the conviction and sentence as already mentioned followed.

9. Assailing the conviction and sentence the learned counsel appearing for the appellant contended that the court below was not justified in acting on the uncorroborated testimony of PWs 1 and 2 to hold the accused guilty. The learned counsel for the appellant did not dispute the proposition that if the evidence of the Police Officers or the Excise Officers is above board or is consistent, cogent and convincing enough, it may not be necessary to look for corroboration. But in the case on hand, there is contradiction between the evidence of PW1 and Ext.P1 and so also there is contradiction in the evidence of PWs 1 and 2. In such circumstances, their evidence being weak, the court had to necessarily look for corroboration. In fact, the mahazar does not contain the recital that labels containing the signatures of the accused and PW1 were affixed. That

comes for the first time when PW1 was examined in court. It is a clear subsequent development. It is further pointed out that it is rather surprising to note that PW5, the Investigating Officer did not feel it necessary to inquire into a complaint regarding the escape of the accused from the custody of the Excise Officials. Further, it is pointed out that in the light of the fact that thumb impression on Ext.P1 is disputed, the prosecution is bound in law to prove that the thumb impression found on Ext.P1 is that of the accused. The above infirmities were overlooked by the court below and that resulted in a wrong conviction being passed.

10. The learned Public Prosecutor on the other hand contended that the evidence of PWs 1 and 2, taken along with Ext.P1 would clearly show that the incident has occurred as alleged by the prosecution. True, there are certain minor inconsistencies in the evidence of PWs 1 and 2. But that is bound to occur for the witnesses were deposing after a few years. It is also true that the mahazar

Ext.P1 does not contain the recital that on samples and the balance contraband articles, labels containing the signature of the accused and PW1 were affixed. That is spoken to by PW1 for the first time in court.

11. But Ext.P1 mahazar gives a vivid description of what transpired at the place of incident. That is their usual detection. There is no infirmity pointed out in Ext.P1 except regarding the label which has already been referred to. It is not either proved or not claimed that Ext.P1 was prepared elsewhere.

12. Much was said about the escape of the accused. It was contended that there is a story invented to get over various other inconvenience situations and it is significant to notice, according to the learned counsel for the appellant, that this fact is not inquired into or investigated upon by the Investigating Officer. He had no answer for this omission. It is therefore contended that there is nothing to show that the claim of accused having escaped is true.

13. Though the argument may look attractive at the first blush, it is without any basis at all. Ext.P3 report though addressed to the Excise Circle Inspector, copy of the same had been produced in court on the very next day itself. That indicates that the escape was brought to the notice of the court at the earliest point of time. When the report was already before court, if PW5 felt that there was no necessity or need to inquire into that aspect, he could not be found fault with. There is no purpose in inquiring about the escape because the report was already before court and no purpose would have been served in conducting inquiries in that regard.

14. Regarding the labelling, as already stated, there is inconsistency between PW1 and Ext.P1 mahazar. If Ext.P1 mahazar says about the seizure and the sampling done, obviously, the samples which have been sent for Chemical Analysis is the sample taken by PW1. That going by the Chemical Analysis Report, seal found on the sample tallied

with the specimen seal provided. There can be no room for doubt that 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. There can be no doubt in that regard at all. Further, the prosecution has been careful enough in this case to send the forwarding note along with the specimen seal. Therefore, the above contention cannot stand.

15. Even otherwise the mere fact that labels were affixed is not mentioned in Ext.P1, does not assume much significance. What is significant therein is the actual seizure and also the sampling. If the seizure and the sampling is proved, the mere fact that subsequently, there was omission to mention about the labels affixed on the contraband article and sample cannot be taken as a ground to doubt the prosecution case.

16. After having gone through the evidence, this Court is unable to understand that the articles produced before court is not the articles seized from the possession of the accused. None of these contentions can be accepted in the light of the documents produced before court at the earliest point of time. The result is that there are no grounds made out to interfere with the finding of the lower court. The conviction has only to stand.

17. Faced with the above situation, the learned counsel for the appellant contended that considering the various aspects, the sentence imposed is on the high side. It is also pointed out that the quantity seized from the possession of the accused is not so large so as to warrant such a severe sentence. At the time of detection, he was aged 50. Considering the fact that nearly 15 years have elapsed and things might have quietened down and accused might have settled down. It is also pointed out that there is nothing to show that the accused had criminal antecedents

or there is no allegation to show that having gone on bail, he had indulged in the such activities. Considering the various aspects, the learned counsel for the appellant pointed out that leniency can be shown with regard to the sentence.

18. There seems to be considerable force in the above submission. 15 years have elapsed since the detection of the offence. Several changes might have occurred. Things would have quietened down and the accused might have settled for a family life. That is not to say that offence is to be taken lightly, but to remind oneself that he has also to take note of the subsequent events which might have a bearing on the imposition of sentence. As contended by the counsel for the appellant, there is nothing to show that there is any criminal antecedents as far as the accused is concerned, nor is there any allegation that subsequent to going on bail, he has indulged in such activities. Considering the quantity also, it is felt that the sentence imposed is on the high side.

After having given anxious consideration in this regard, it is felt that the sentence imposed by the court below is too harsh. Hence, the sentence imposed by the court below is set aside and instead, the accused is sentenced to suffer simple imprisonment for two months and to pay a fine of ₹ 1 lakh within a period of 3 months from today, failing which, he shall suffer simple imprisonment for a further period of one month. Set of as per law will be allowed.

Sd/-
P.BHAVADASAN
JUDGE

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P.A. to Judge