

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 17TH DAY OF SEPTEMBER 2015/26TH BHADRA, 1937

CRL.A.No. 399 of 2007 ()

AGAINST THE JUDGMENT IN SC 806/2005 of ADDITIONAL SESSIONS
COURT FAST TRACK – II, PALAKKAD.

APPELLANT(S)/ACCUSED:

KUTTAPPU @ RAMADAS, S/O.SANKARANARAYAN,
PALAKKODTHODI VEEDU, THRIKKANGOD DESOM
VANIYAMKULAM VILLAGE, OTTAPALAM TALUK.

BY ADVS.SRI.PHILIP T.VARGHESE
SRI.THOMAS T.VARGHESE
SRI.A.ARUN

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA, REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM
REPRESENTING THE EXCISE OFFICE, OTTAPALAM.

BY PUBLIC PROSECUTOR SMT. S. HYMA.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
17-09-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 399 of 2007

Dated this the 17th day of September, 2015.

JUDGMENT

The accused was prosecuted for the offences punishable under Sections 55(a) and 8(2) of the Abkari Act. He was found guilty. He was convicted and sentenced to undergo simple imprisonment for one year and to pay fine of Rs.1,00,000/-, in default, to undergo simple imprisonment for three months. Set off as per law was allowed.

2. According to the prosecution case, on 15.5.2013 at about 6.15 p.m. while P.Ws. 1 and 2 along with other officers of the Excise department were on routine patrol duty, they happened to see the accused coming along the way with a can in his hand. Seeing them, the accused panicked and there arose suspicion in the mind of the officers. He was intercepted and the can carried by him was seized. The contents were examined and it was revealed that it was illicit

liquor. According to the prosecution, the persons who had come along with the officers were also convinced of the same. P.W.1 prepared Ext.P1 mahazar and Ext.P2 is the arrest memo by which the accused was arrested. He claims to have taken sample of the liquor and sealed the same. He also sealed the rest of the contents in the can. According to him, on the sample bottle and in the can which was seized, labels were containing his signature and that of the accused. He then returned to the Excise Range Office along with the accused and the articles seized and registered crime as per Ext.P3. The article and the accused were produced before the court on the next day. Property list prepared is Ext.P4 and the forwarding note is Ext.P5.

3. Investigation was done by P.W.5. He recorded statements of witnesses and prepared Ext.P6 scene mahazar. He procured the chemical analysis report Ext.P7, completed investigation and laid charge before court.

4. The court, before which final report was laid took cognizance of the offences. Finding that the offences are exclusively triable by a court of Sessions, the said court committed the case to Sessions Court, Palakkad. The said court made over the case to Additional Sessions Court Fast Track No.II, Palakkad for trial and disposal.

5. The latter court, on receipt of records and on appearance of the accused framed charge for the offences punishable under Sections 55(a) and 8(2) of the Abkari Act. To the charge, the accused pleaded not guilty and claimed to be tried. The prosecution therefore had P.Ws.1 to 5 examined and had Exts.P1 to P7 marked. M.O.1 was identified and marked. After the close of the 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. He also stated that he had been falsely implicated and he had nothing

to do with the article seized. 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.

6. Relying on the evidence of P.Ws.1 and 2 and also Ext.P1 mahazar which is the contemporaneous document, the court below found that the prosecution has succeeded in establishing the case against the accused. Therefore, conviction and sentence as already mention followed.

7. Assailing the conviction and sentence passed by the court below, learned counsel appearing for the appellant contended that the court below has omitted to note the disparities and inconsistencies in the evidence of P.Ws.1 and 2 which made the detection suspicious. It is also emphasized that P.W.1, the detecting officer, did not speak about having seen the independent witnesses sign Ext.P1 or M.O.1. It is also emphasized that M.O.1 produced before the court is alleged to have contained label with the signature of the

accused and P.W.1. It is therefore contended that the article produced before the court may not be the article which was actually seized from the accused. Learned counsel also emphasized that there were other persons who had gone along with P.Ws.1 and 2 and none of them were examined for reasons best known to the prosecution.

8. In the light of the infirmities in the evidence, a reasonable suspicion is created and if that be so, according to the learned counsel, the accused is entitled to acquittal.

9. Learned Public Prosecutor on the other hand chose to support the finding of the court below. According to the Public Prosecutor, it is an open and shut case. The accused was caught red handed with the contraband article and may be that there are some infirmities in the evidence of P.Ws.1 and 2, they are not so glaring enough to doubt their version. Further, it is pointed out that there is no suggestion either to P.W.1 or P.W.2 that they had any ill-motive to falsely

implicate the accused. The contemporaneous document Ext.P1 contains all the necessary details and that further strengthen the prosecution case. Further, learned Public Prosecutor contends that the prompt production of the accused and the article before the court below also authenticates the claim made by the prosecution.

10. After having heard learned counsel for the appellant and the learned Public Prosecutor and having perused the records, it appears that there is hardly any reason to interfere with the finding of the court below.

11. P.W.1 is the detecting officer and P.W.2 is the officer who had accompanied him while going for patrol duty. Both of them gave a consistent version regarding the incident. They say that while they were going along the way, they happened to see the accused coming along holding a can. Both of them say that on seeing them, he panicked and tried to run away and he was apprehended and article seized. Both

of them also say about the sample taken by P.W.1 and also the labelling of M.O.1.

12. Counsel appearing for the appellant pointed out that while P.W.1 says that he had occasion to see the accused 300 meters away, P.W.2 would say that it is only 50 meters. This would be sufficient to show that there is inconsistency in the evidence of P.Ws. 1 and 2.

13. Two things will have to be remembered in this context. First is that the distance spoken to by this witness would be approximate and cannot be given undue weight. Further, the incident was on 15.5.2003 and the witnesses were examined on 9.1.2006, i.e., after three years. It is imprudent on the part of the court to expect photographic memory from the witnesses. Inconsistencies and contradictions are bound to occur. The only caution for the court is to see whether they are so glaring so as to affect the substratum of the prosecution case.

14. Learned counsel appearing for the appellant is correct in her submission that the witnesses turned hostile and there is no independent evidence to the seizure.

15. That is a routine affair in almost all cases of this nature. But the law is that merely because the independent witness did not support the prosecution version, that does not mean that the case has to be thrown out. In fact, the presumption is otherwise. Police officer is just like any other witness and unless there are compelling reasons to doubt his version, there is no reason to discard the evidence. Except for the inconsistency regarding distance between the officers and the accused at the initial stage, there is no much inconsistency in the evidence of P.Ws.1 and 2. This is one important aspect referred to by the learned counsel for the appellant.

16. Learned counsel pointed out that P.W.1 says that he had signed on the label affixed on M.O.1 but does not

say that P.W.2 had also signed. P.W.2 in his turn would say that only he signed M.O.1. Learned counsel pointed out that at the time of evidence, only the signature of the accused was found missing. Of course P.W.1 says about his signature only and he did not say that P.W.2 had also signed on the lable affixed on M.O.1. But one cannot omit to note that Ext.P1 seizure mahazar prepared immediately after the incident contains all the details. The mere fact that P.Ws. 1 and 2 had not spoken about having mutually seen each other signing the label affixed on M.O.1 does not lead to the conclusion that there was no seizure.

17. With regard to the sample taken by P.W.1, it gets ample support from the evidence of P.W.2 also. There is no suggestion to P.Ws.1 and 2 that only the officers had affixed his signature on the label affixed on the sample. As already stated, Ext.P1 seizure mahazar which is prepared on the spot immediately after the incident contains all the details

and contains the signature of witnesses who were alleged to have seen the incident. This Court is not forgetting the fact that P.Ws.3 and 4, the two independent witnesses turned hostile and did not support the prosecution case. But it is significant to note that they admitted their signature on Ext.P1. They have no case that they have signed the document at any other place. So far as the prosecution case is concerned, the presence of the Excise Officers and the witnesses at the spot on the alleged date thus stands proved.

18. P.W.1 could have been more careful in his conduct. But the infirmities pointed out in his evidence is hardly sufficient to doubt his version which gets ample support from the evidence of P.W.2 and Ext.P1. There is no suggestion either to P.W.1 or P.W.2 that they had any axe to grind against the accused so as to falsely implicate the accused.

19. In the light of the above facts and circumstances, the court below was justified in coming to the conclusion that the prosecution has established the case beyond reasonable doubt. The conclusion has only to stand.

20. Faced with the above situation, learned counsel appearing for the appellant contended that the sentence imposed is very harsh and disproportionate to the offence alleged against the accused. After all, according to the learned counsel, the contraband article seized is only 6 ½ litres and that does not warrant a heavy sentence.

21. Though the act is to be deprecated and is to be discouraged, the fact remains that the sentence seems to be proportionate to the offence committed by the accused. Considering the quantity seized and the fact that there is no previous history of the accused having involved in such nefarious activities, it is felt that a lenient view needs to be taken so as to mend his ways.

22. Considering the above facts and circumstances of the case, while upholding the conviction of the accused for the offence alleged against him, the sentence awarded is set aside and the accused is sentenced to undergo simple imprisonment for six months and to pay fine of Rs.1,00,000/–, in default of payment of which to suffer simple imprisonment for one month.

This appeal is partly allowed.

P. BHAVADASAN,
JUDGE

sb.