

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 5TH DAY OF OCTOBER 2015/13TH ASWINA, 1937

CRL.A.No.464 of 2007 (E)

AGAINST THE JUDGMENT IN SC 35/2002 of ADDL.SESIONS COURT
(ADHOC)-II, PALAKKAD DATED 03-02-2007

APPELLANT/ACCUSED:

VISWANATAHAN, S/O.MUNDAN, AGED 27 YEARS,
EDATHARA VEETIL, MUTHANGA, NOOLPUZHA AMSOM DESOM,
SULTHAN BATHERY TALUK, WAYANAD DISTRICT.

BY ADV. SRI.N.J.ANTONY

RESPONDENTS/STATE:

1. EXCISE INSPECTOR, SULTHAN BATHERY,
WAYANAD DISTRICT.
2. STATE OF KERALA REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY SRI.C.K. JAYAKUMAR, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
05-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.464 OF 2007

Dated this the 5th 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 Abkari Act. He was found guilty and was therefore convicted and sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs.1 lakh with default clause of rigorous imprisonment for six months. Set off as per law was allowed.

2. Incident in this case occurred on 13.08.2000. While CW1 along with PW1 and other officers were on patrol duty, they happened to see the accused coming along the road holding a plastic can. It was at 7 a.m in the morning. Feeling suspicious, they intercepted the accused and examined the contents of the can. That found to be arrack. The contraband article was seized and CW1 took sample of the same. Sample was sealed and label containing the signatures of the accused, independent witnesses and CW1 was affixed. The rest of the contraband article was also

sealed and labeled. Ext.P1 is the mahazar prepared at the spot. They returned to the office and CW1 registered crime against the accused.

3. Investigation was taken over by PW3. He prepared Ext.P2 scene mahazar. The property list is marked as Ext.P3. Ext.P4 is the forwarding note and Ext.P5 is the chemical analysis report received by the officer concerned. PW3 completed investigation and laid charge before court.

4. The court before which final report was laid took cognizance of the offence and finding that the offence is exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Kalpetta under Section 209 Cr.P.C. The said court made over the case to Additional Sessions Court (Adhoc II), Kalpetta for trial and disposal. The latter court, on receipt of records and on appearance of the accused, framed charge for the offence under Section 55(a) of Abkari Act, to which, the accused pleaded not guilty and claimed to be tried.

5. The prosecution therefore had PWs 1 to 4 examined and Exts.P1 to P7 marked. M.O.1 was got identified and marked.

6. After the close of the prosecution evidence, 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 adduced DW1 from his side.

8. Presumably, on the basis of the evidence of PWs 1 and 4 taken along with Ext.P1 mahazar, court below formed the opinion that the prosecution has succeeded in establishing the case against the accused. Conviction and sentence as already mentioned followed.

9. Assailing the conviction and sentence, learned counsel appearing for the appellant contended that the detection was on 13.08.2000 but the article was produced before court only on 16.08.2000. The delay of three days is unexplained. Further it is contended that the evidence furnished by DW1 has not been appreciated and that has resulted in failure of justice. Finally it is contended that the sentence imposed by the court below is too

harsh and is disproportionate to the offence committed by the accused. According to the learned counsel, the conviction and sentence cannot stand.

10. Learned Public Prosecutor, on the other hand, contended that the evidence of PWs 1 and 4 taken along with the contemporaneous document namely, Ext.P1 clearly establish the guilt of the accused. The court below has analysed the evidence in considerable detail and has come to the conclusion that their evidence is acceptable. There is no reason to interfere with the findings of the court below, according to the learned Public Prosecutor.

11. As rightly pointed out by the learned counsel appearing for the appellant, evidence regarding detection of offence is confined to the testimony of PWs 1 and 4 who were on patrol duty along with CW1. They speak about having seen the accused carrying a plastic can. Both of them say that feeling suspicious, accused was intercepted and can in his possession was seized and on examination of the same it was found to contain arrack. Both of them say about sampling and sealing of the contraband

article.

12. Learned counsel appearing for the appellant invited attention of this Court to paragraph 12 of the judgment wherein it is pointed out that while PW1 would say that accused had crossed the road before he was apprehended, PW4 would say otherwise. This glaring inconsistency, according to the learned counsel, is sufficient to belie the prosecution version.

13. One has to remember that the witnesses were giving evidence four years after the incident and it is imprudent to expect mathematical precision. Inconsistency pointed out in the evidence of PWs 1 and 4 is too insignificant to be taken note of. Ext.P1 mahazhar, a contemporaneous document prepared at the place of occurrence, contains all the necessary details. Offence was detected on 13.08.2000 and the article was produced before court on 16.08.2000. PW3 has given reason for the same. The reason given is not shown to be unjustified or unreasonable. It is a possible explanation. The contention that evidence of DW1 has not been appreciated in the proper perspective cannot be given much weight since it serves no purpose at all. DW1 speaks about

the accused having arrested by the Excise Officers and the Excise Officers having made search of his house before the day on which the accused was arrested and the Excise Officers having directed the accused to come to their office etc. In cross examination, he was unable to meet several queries of the learned Public Prosecutor. In the light of the statement given in cross examination, court below was justified in disbelieving DW1.

14. Result of the above discussion is that the court below was justified in believing the evidence of PWs 1 and 4 to hold that the accused is guilty of the offence especially taking note of the contents of Ext.P1. There is nothing to show that the officers concerned had any axe to grind against the accused and that they had falsely implicated the accused. The conviction has only to stand.

15. The quantity which was found to be in possession of the accused is 10 liters. Learned counsel for the appellant may be justified in his submission that the sentence imposed is too harsh. Further there is one aspect. The offence under Section 55(a) of Abkari Act, by no stretch of imagination, can be

attracted to this case since the said Section involves imports, exports, transports, transits or possesses liquor or any intoxicating drug which are not available in the case on hand. But the accused is found guilty of the offence under Sections 8(1) and (2) of Abkari Act.

In the result, while setting aside the conviction of the accused for the offence under Section 55(a) of Abkari Act, he is convicted for the offence under Sections 8(1) and (2) of Abkari Act and the sentence imposed by the court below is set aside and the accused is sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs.1 lakh in default of payment of which to suffer rigorous imprisonment for one month. Set off as per law is allowed.

With the above modification, this appeal is disposed of.

Sd/-

P.BHAVADASAN
JUDGE

smp

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P.A to Judge.