

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 1ST DAY OF DECEMBER 2015/10TH AGRAHAYANA,
1937

CRL.A.No. 916 of 2006 ()

AGAINST THE JUDGMENT IN SC 1330/2001 of ADDL.S.C. FOR TRIAL OF
ABKARI ACT CASES, NEYYATTINKARA

APPELLANT(S)/ACCUSED:

BHUVANENDRAN @ MOHANAN,
S/O. SUKUMARA PANICKER, RAJESH NIVAS, MALAYAM,
PALLICHAL DESOM, NEYYATTINKARA TALUK.

BY ADVS.SRI.M.BALAGOVINDAN
SRI.M.R.SASITH

RESPONDENT(S)/STATE @ COMPLAINANT:

1. STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

2. EXCISE INSPECTOR,
KATTAKKADA POLICE STATION.

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
01-12-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 916 of 2006

Dated this the 1st day of December, 2015.

JUDGMENT

The accused was prosecuted for the offence punishable under Section 58 of the Abkari Act. He was found guilty. He was therefore convicted and sentenced to undergo rigorous imprisonment for two years and to pay fine of Rs.1,00,000/-, in default, to undergo rigorous imprisonment for three months.

2. The incident occurred on 27.4.1998. P.W.3, the Excise Inspector, along with P.W.2, Preventive Officer of Excise Range, Kattakada, and other officers of the Excise Department, went on a routine patrol duty. When they reached near Malayam Bridge, the accused was seen coming along the road carrying a can with him. The can was seized and the contents were examined and it was found to be arrack. Arrest memo was prepared and he was arrested. The

accused was arrested and the can was seized. The can so seized was sealed and labelled and the label contained the signature of the accused, P.W.3 and the witnesses. The mahazar prepared at the spot is marked as Ext.P1. He returned to the office along with the accused, contraband article and the documents. He registered Crime No. 9 of 1998 as per Ext.P3 occurrence report. He had the accused and the articles produced before court and the remand report is marked as Ext.P4. Ext.P5 is the property list obtained by him which was sent to the court along with the requisition. He prepared the forwarding note and sent it to court for taking sample and sending it for chemical examination. The report obtained is Ext.P6. He completed investigation and laid charge before court.

3. 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, Thiruvananthapuram under Section 209 Cr.P.C. The said court made over the case to Additional Sessions Court for trial of Abkari Act Cases, Neyyattiinkara for trial and disposal.

4. The latter court, on receipt of records and on appearance of the accused framed charge for the offence punishable under Section 58 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 4 examined and had Exts.P1 to P6 marked. M.O.1 was got identified and marked. After the close of the prosecution evidence, the accused was questioned under Section 313 Cr.P.C., wherein he denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent. 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.

5. Mainly based on the evidence of P.Ws. 2 and 3 and the contemporaneous document, the court below went on to hold that the offence has been made out. Conviction and sentence followed.

6. Assailing the conviction and sentence, learned counsel appearing for the appellant raised three points for consideration. They are (1) there is considerable delay in producing the materials before court and that is fatal to the prosecution case. For the above proposition, learned counsel relied on the decision reported in *Ramankutty v. Excise Inspector, Chelannur Range* (2013(3) KHC 308). It is pointed out that there is no evidence as to who had taken the sample sent for chemical analysis. Finally, it is pointed out that no forwarding note has been marked in the case and there is nothing to show that the sample seal was available to the court for comparison.

7. Learned Public Prosecutor on the other hand contended that the court below has accepted the evidence of P.Ws. 2 and 3 and found that the contraband articles were seized from the possession of the accused. The court below has chosen to accept the evidence and found that the accused was in possession of the contraband article. There is no ground to interfere with the said finding.

8. Merely because contraband article is alleged to have been recovered from the possession of the accused, it does not automatically follow that the offence is made out. Assuming that the evidence of P.Ws. 2 and 3 is sufficient to show that the contraband articles were seized from the possession of the accused, the prosecution has to prove that sample was taken properly and sent for chemical examination. The evidence of P.Ws. 2 and 3 and the contemporaneous document namely, Ext.P1, does not indicate that sample was taken at the spot. P.W.2 speaks about having prepared a

forwarding note and sent it to court. But the same is not marked in the case at all and none of the prosecution witnesses say as to who had taken the sample and from where. In the absence of any evidence to show the person who had taken the sample and in the light of the non-production of the forwarding note, it is not possible to say that the sample sent for chemical examination is the sample taken from the contraband article seized from the possession of the accused. As regards the delay in producing the articles before court, P.W.3 admitted that the articles were received in court only on 11.5.1998. In the decision reported in Ramankutty v. Excise Inspector, Chelannur Range (2013(3) KHC 308), it was held that even a day's delay is fatal unless it is properly explained. In this case, there is considerable delay in producing the articles before court and since it has not been properly explained, it is fatal to the prosecution case.

For the above reasons, this Court is unable to uphold the finding of the court below that the accused has committed the offence alleged against him. This appeal is allowed, the conviction and sentence passed by the trial court are set aside and it is held that the prosecution has not succeeded in proving the guilt of the accused beyond reasonable doubt. The accused is acquitted of the charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

P. BHAVADASAN,
JUDGE

sb.