

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 2ND DAY OF NOVEMBER 2015/11TH KARTHIKA, 1937

CRL.A.No. 918 of 2006

AGAINST THE JUDGMENT IN SC 893/2004 of ADDL.SESIONS COURT
(ADHOC-II) KASARAGODE DATED 07.04.2006

APPELLANT/ACCUSED:

NARAYANAN, S/O.RAMAN, AGED 49,
KALATHINKAL HOUSE, KARICHERI, KOLATHUR.

BY ADV. SRI.M.RAMESH CHANDER

RESPONDENTS/STATE/COMPLAINANT:

1. STATE OF KERALA REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.
2. STATION HOUSE OFFICER,
BEDAKAM POLICE STATION.

BY SMT. LILLY LESLIE, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
02-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.918 OF 2006

Dated this the 2nd day of November, 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 suffer rigorous imprisonment for one year and to pay a fine of Rs.1 lakh with default clause of rigorous imprisonment for three months.

2. The incident in this case is said to have occurred on 11.08.2002. PW5 was then functioning as Sub Inspector of Police of Bedakam Police Station. While PWs 4 and 5 were in the Station, they received a telephonic information that near a quarry in Karicheri, a person by name Narayanan was engaged in sale of arrack. After recording the information in the GD, PW5 along with team of officers went to the place of occurrence and by about 5.30 p.m they reached the place and they found a person standing with a bag in the northern extremity of the culvert.

Seeing the police party, he tried to escape. But he was successfully apprehended and the bag in his possession was seized. On examination of the bag, it was found to contain packets of white liquid. On examining one of the packets, the officers were convinced that he was carrying arrack. Accused was arrested on the spot as per Ext.P3 arrest memo. Out of the 53 packets found in the bag carried by the accused, 6 more packets were opened and the contents of 7 packets which were opened, were emptied into two bottles of 375 ml each and was taken as sample. That was sealed and labeled. The label contained the signature of witnesses, accused and PW5. The balance 46 packets were seized along with the bag, and mahazar was prepared as per Ext.P1. Thereafter, PWs 4 and 5 along with the accused, contraband article and the documents were returned to the Station and registered a crime as per Ext.P4 First Information Report.

3. Preliminary investigation was done by PW5 himself who prepared Ext.P2 scene mahazar. He prepared Ext.P5 property list

and also sent to the court the forwarding note Ext.P6. PW5 says that till the articles were produced before court, they were in his safe custody. He recorded the statement of witnesses and obtained chemical analysis report, Ext.P7. PW6 verified the file and laid final report in the case.

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, Kasaragod. The said court made over the case to Additional Sessions Court (Ad hoc) II, Kasaragod 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 the charge, accused pleaded not guilty and claimed to be tried.

5. The prosecution, therefore, had PWs 1 to 6 examined and Exts.P1 to P7 marked. M.O.s 1 and 2 were 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. He denied having committed any act as alleged by the prosecution.

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. The court below found the evidence of PWs 1 to 5 reliable especially the evidence of PWs 1, 2, 4 and 5. Finding that the contemporaneous document, Ext.P1 and the prompt production of accused and documents before court strengthens the prosecution case, court below held that the prosecution has succeeded in establishing the guilty of the accused. The conviction and sentence as already mentioned followed.

9. Assailing the conviction and sentence, learned counsel appearing for the appellant pointed out that even though detection of offence was on 11.08.2002, articles seized were produced before court only on 28.08.2002. There is no

satisfactory explanation for the undue delay in producing the property seized before court. In the absence of any accepted explanation, the only conclusion possible is that the articles produced were not the articles seized from the possession of the accused and if that be so, benefit of doubt should go to the accused. The court below was not justified in holding that the accused is guilty without convincing and cogent reason. On the sole ground, learned counsel for the appellant contended that the accused is entitled to succeed.

10. Learned Public Prosecutor, on the other hand, contended that it is true that there is delay in producing the articles before court. But, that has no consequence in the case for the reason that accused, seizure mahazar, arrest memo and First Information Report were produced on the next day itself before court and PW5 in his evidence has stated that from the date of detection of the crime till the date on which the articles were produced before court, they were in his safe custody. This claim made by PW5 is not challenged in cross examination and

therefore there is no merit in the argument regarding identity of the articles seized and the sample drawn by PW5. Even assuming that there was any delay in producing the articles before court, that would not cause any prejudice to the accused since, according to the learned Public Prosecutor, accused, arrest memo, Ext.P1 mahazar and also First Information Report were produced on the very next day itself. It was these factors which have persuaded the court below to find the accused guilty. The view taken by the court below is a possible and reasonable one and if that be so, no interference is called for.

11. The detection in this case is made by PW5 and evidence of actual detection and seizure is confined to the testimony of PWs 4 and 5. Among them, PW5 is the Sub Inspector of Police. He as well as PW4 who had accompanied him for the seizure say that while they were at the Station, they received a telephonic information that the accused was engaged in sale of illicit arrack near a quarry. PW5 is careful enough to say that the matter was recorded in the GD and thereafter they

proceeded to the place. Both of them say that they reached the place at 5.30 p.m and they happened to see the accused standing on the northern end of the culvert with a bag in his hand. They further depose that seeing them, the accused tried to run away but he was successfully apprehended and the bag in his hand was seized. The bag found to contain packets of 100 ml liquid. One of the packets were opened and by taste and smell, the contents were identified as arrack. PW5 says that then six of the packets were opened and the contents of all the packets were emptied into two bottles having a capacity of 375 ml each and they were taken as samples. PW5 further says that he affixed his seal and also the label containing the signature of the accused, witnesses and himself on the samples. Both PWs 4 and 5 says that the balance articles were secured, sealed and labeled.

12. It is interesting to note that in the case on hand, PWs 1 and 2, two independent witnesses to a considerable extent support the prosecution case. PW1 admits that he had actually seen the seizure and he admitted his signature on Ext.P1.

However, he denied having taken sample by PW5. PW2 also asserts that he had occasion to see arrack being seized from the possession of the accused. He is unable to remember the exact date on which the incident had occurred. He also admits that he had signed in the narration that he had seen the actual seizure of the articles.

13. Apart from the fact that the evidence of PWs 4 and 5 gets sufficient corroboration at the hands of PWs 1 and 2 to a considerable extent though they were at a later stage declared hostile, the narration in Ext.P1 further strengthens the prosecution version. Ext.P1, a contemporaneous document prepared by PW5 contains all the essential details and that document along with accused is seen to have been produced on 12.08.2002. So also arrest memo and First Information Report are seen produced on 12.08.2002. This conduct has to be viewed in the light of the assertion made by PW5 that from the date of seizure till the articles were produced before court, they were in his safe custody. The late production of property has

been condemned by this Court. But, no prejudice has been caused to the accused by the said conduct if it was with their proper custody. In the case on hand, PW5 has categorically stated that the articles were in his custody though proper explanation is not offered for the delay. One cannot omit the prompt production of accused, arrest memo and also the First Information Report which would, to a considerable extent, support the prosecution version of the incident. Viewed in the light of the above circumstance, the late production of articles would not assume much of significance. There is nothing to indicate that the articles produced at a later stage were not the one seized from the possession of the accused or that samples were not taken as alleged. Further, the forwarding note namely, Ext.P6 contains the sample of the seal affixed by the officer concerned. The chemical analysis report shows that when the sample was reached in the lab, the seal was in tact. There is no reason to believe that the articles produced on 28.08.2002 were not the articles seized from the possession of the accused. At

any rate, the view taken by the court below is a possible view. If that be so, no interference is called for in the findings of the court below. Accordingly, the finding of guilt and the order of conviction have only to stand.

14. Faced with the above situation, learned counsel appearing for the appellant contended that the sentence imposed is on the higher side and is not proportionate to the offence committed by the accused. It is also pointed out that there was no history of the accused having indulged in nefarious activities. It is further pointed out that he should be given an opportunity to reform himself and the sentence may be reduced accordingly.

15. There is some force in the above contention. The quantity of arrack seized is 53 packets and since detection 13 years have been elapsed and things might have been settled down. This is not to say that the offence committed is not of serious nature but only to point out that at the passage of time, age at the time of detection of offence which have a role to play in the matter determines the sentence.

16. After having given anxious consideration to the facts and circumstances of the case, it is felt that the sentence imposed is on the higher side.

In the result, this appeal is partly allowed. While sustaining the conviction for the offence under Section 8(1) of Abkari Act instead of Section 55(a) of Abkari Act, the sentence imposed is set aside and instead the accused is sentenced to suffer rigorous imprisonment for four months and to pay a fine of Rs.1 lakh with default clause of simple imprisonment for one month. Set off as per law is allowed.

Sd/-

P.BHAVADASAN
JUDGE

smp

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P.A to Judge.