

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 26TH DAY OF OCTOBER 2015/4TH KARTHIKA, 1937

CRL.A.No. 962 of 2006

AGAINST THE JUDGMENT IN SC 1895/2003 of ADDL. DISTRICT & SESSIONS
COURT (ADHOC)-I, KOLLAM DATED 25-04-2006

APPELLANT/ACCUSED:

SATHYABHAMA, D/O.PANKAJAKSHI,
PARAMPILAYYATHU VEEDU, PADINJATTUMKIZHAKKU,
SOORANAD NORTH.

BY ADVS.SRI.P.B.SAHASRANAMAN
SRI.K.JAGADEESH
SRI.T.S.HARIKUMAR

RESPONDENT/COMPLAINANT:

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

BY SMT. LILLY LESLIE, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
26-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.962 OF 2006

Dated this the 26th day of October, 2015.

J U D G M E N T

The accused was prosecuted for the offences punishable under Sections 55(a) and 55(i) of Abkari Act. He was found guilty on both counts and was therefore convicted and sentenced to suffer rigorous imprisonment for five years and to pay a fine of Rs.1 lakh with default clause of simple imprisonment for one year under Section 55(a) of Abkari Act and also to suffer rigorous imprisonment for five years and to pay a fine of Rs.1 lakh with default clause of simple imprisonment for one year under Section 55(i) of Abkari Act. The substantive sentence were directed to run concurrently. Set off as per law was allowed.

2. The incident in this case took place on 19.11.2001. On that day, PW3 had gone for patrol duty along with other officers and when they reached a place called High School junction, they received reliable information that the accused is selling arrack from her house. At about 10.30 a.m they reached the house of

the accused and inspected the premises outside the house. On the eastern side of the house and north to the cattle shed beneath the coconut leaves, they found a can having a capacity of 10 liters containing some liquid. They also found a huge plastic cover containing small polythene covers and one of the covers broke open and by taste and smell the contents were identified as arrack. The liquid in the can was also examined and it was identified as arrack. They also found 8 big plastic kits each containing small polythene covers and on examination of the contents of covers, it was found that the liquid contained in those covers was arrack. After preparing search memo, house of the accused was searched. They found a pit of one foot depth on the south western corner of the middle room and inside that pit there were polythene covers containing some liquid. On examination of the liquid, it was identified as arrack. All the covers were cut open and the contents were poured into a vessel and from the vessel sample of 150 ml was taken in a bottle having a capacity of 180 ml and another sample of 150 ml was taken from the can of 10 liters in a bottle having a capacity of 180ml. The balance

liquid in the vessel was poured into three cans each having a capacity of 35 liters and one can of 5 liters capacity. PW3 claims to have sealed and labeled the contraband articles. The labels contained the signature of PW3 and witnesses. Ext.P2 is the search memo. Ext.P3 is the property seizure memo. After returning to the Station, on the basis of the documents and the articles seized, Crime No.300/2001 was registered as per Ext.P4 First Information Report. PW3 says that he prepared the property list, Ext.P5 and sent the property to the court. He also says that he prepared a report regarding the whereabouts of the accused as per Ext.P6. He also claimed that he prepared Ext.P7 forwarding note and obtained Ext.P8 chemical analysis report. After investigation, he laid charge before court.

3. The court before which final report was laid took cognizance of the offence and on finding that the offence is exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Kollam. The said court made over the case to Additional District and Sessions (Adhoc) Court-1, Kollam for trial and disposal. The latter court, on receipt of

records and on appearance of accused, framed charge for the offences under Sections 55(a) and 55(i) of Abkari Act. To the charge, accused pleaded not guilty and claimed to be tried.

4. The prosecution therefore had PWs 1 to 3 examined and Exts.P1 to P8 marked. M.O.I to M.O.IV series (2) were got identified and marked.

5. After the close of the prosecution evidence, accused was questioned under Section 313 Cr.P.C. She denied all the incriminating circumstances brought out in evidence against her and maintained that she is innocent. She also claimed that during the relevant time, she was not at house and she was staying with her son-in-law in a different place.

6. Finding that the accused could not be acquitted under Section 232 Cr.P.C, she was asked to enter on her defence. She chose to adduce no evidence.

7. Greatly impressed by the evidence of PWs 1 and 3 and also the contemporaneous document Ext.P1, court below found the accused guilty. Conviction and sentence as already mentioned followed.

8. Assailing the conviction and sentence, learned counsel appearing for the appellant contended that the court below has not applied its mind to the facts of the case. Learned counsel pointed out that the detection of offence was on 19.11.2001 whereas articles were produced before court on 11.12.2001 i.e. after the expiry of 22 days. No explanation whatsoever is offered for the considerable delay in producing the articles before court. In such a situation, relying on the decision in **Ramankutty vs. Excise Inspector, Chelannur Range** (2013 (3) KHC 308), learned counsel contended that the prosecution has to fail.

9. Learned counsel appearing for the appellant then contended that Ext.P7 forwarding note does not contain the sample seal. The seizure mahazar namely, Ext.P1 alleged to have been prepared by PW3 does not also make mention of the nature of the seal used by the officer concerned. In such a situation, relying on the decisions in **Krishnan vs. State** (2015 (2) KLT SN 8 C.No.11) and in **Majeedkutty vs. Excise Inspector** (2015 (1) KLT 624), it is contended that the prosecution has necessarily to fail.

10. Learned Public Prosecutor, on the other hand, contended that the evidence of PWs 1 and 3 are sufficient to come to the conclusion that the offence has been made out. There is no case for the accused that the premises is not belonged to her. Her case is that she was not residing in the premises at that point of time. It is also contended that much quantity of contraband articles was seized and the fact that seal is not affixed on the forwarding note cannot result in acquittal of the accused.

11. It would appear from the records that there is a delay of nearly 22 days in producing the articles before court. No explanation is offered for the delay. In fact there was no attempt to explain the long delay. This Court had occasion to consider the question as to the consequence when there is considerable delay in producing the article before court. Even though the expression 'forthwith' appears in Section 102(3) Cr.P.C, a Division Bench of this Court has held that the property should be forwarded to the court as soon as possible if not immediately. The Division Bench has held that any delay has to be properly

explained. However, in the decision in **Ramankutty vs. Excise Inspector, Chelannur Range** (2013 (3) KHC 308), this issue was considered and it was held that unexplained delay in producing the contraband before court after seizure is fatal to the prosecution case.

12. Apart from the above fact, there is infirmity regarding sample and absence of sample seal in Ext.P7 document. It is worthwhile to remember that even in Ext.P1 mahazar, there is no mention of type of seal alleged to have been used on the sample and on the rest of the contraband article. Even though forwarding note has been prepared, that does not contain the sample seal or the seal used by the officer concerned. Such a situation is considered in the decisions in **Krishnan vs. State** (2015 (2) KLT SN 8 C.No.11) and in **Majeedkutty vs. Excise Inspector** (2015 (1) KLT 624). The principles laid down in the said decisions will apply to the case on hand and there is no reason as to why the accused should not be given the benefit of those decisions.

For the above reasons, this appeal is allowed. The

conviction and sentence passed by the court below are set aside and it is held that the accused is not guilty of the offence. She is acquitted of the charges levelled against her. Her bail bond shall stand cancelled and she is set at liberty.

Sd/-

**P.BHAVADASAN
JUDGE**

smp

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P.A. To Judge.