

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 9TH DAY OF OCTOBER 2015/17TH ASWINA, 1937

CRL.A.No. 995 of 2006

AGAINST THE JUDGMENT IN SC 471/2003 of ADDL. SESSIONS COURT
(ADHOC-III), KASARAGODE.

APPELLANT(S)/ACCUSED:

PONNAMMAR VEETIL BALAN,
S/O.K.KUNHAMBU NAIR, AGED 56 YEARS, ALAYI,
KANHANGAD MUNICIPALITY, HOSDURG TALUK,
KASARAGOD DISTRICT.

BY ADV. SRI.T.K.VIPINDAS

RESPONDENT(S)/STATE:

STATE OF KERALA, REP: BY
PUBLIC PROSECUTOR, HIGH COURT, OF KERALA,
REPRESENTING EXCISE INSPECTOR, HOSDURG EXCISE RANGE.

BY PUBLIC PROSECUTOR SMT. S. HYMA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
09-10-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 995 of 2006

Dated this the 9th day of October, 2015.

JUDGMENT

The accused was prosecuted for the offence punishable under Sections 55(a) of the Abkari Act and he was found guilty and therefore convicted and sentenced to undergo simple imprisonment for two years and to pay fine of Rs.1,00,000/-, in default, to undergo simple imprisonment for six months.

2. The incident in this case is alleged to have occurred on 27.3.2000. P.W.1 at the relevant time was functioning as the Preventive Officer of Hosdurg Anti Narcotic Special Squad. On that day, at about 5.30 p.m., he along with his colleague officers set out for patrol duty. On their way, in a place called Alayi in front of a temple, the accused was seen standing with a plastic can in his hand. Feeling suspicious, the can was seized and the contents were examined. The can was seen to contain 10 litres of liquid. By smell and taste it

was identified as arrack. Arrest memo, Ext.P1, was prepared and the accused was arrested. It is stated that in a bottle having 375 ml capacity, 300 ml arrack was taken as sample and sealed and labelled. Mahazar was prepared and that is Ext.P2. On the can so alleged to have been seized by P.W.1 also, label was affixed. They returned to the office and Ext.P3 occurrence report was prepared. Since the officer who had received the article and the records was no more, P.W.5 was examined by the prosecution to speak about what had transpired after P.W.1 had handed over the article and the accused. He identified property list and forwarding note prepared by the person then in office and after obtaining Ext.P7 report further investigation was conducted by P.W.5. He recorded statements of witnesses and his successor-in-office completed investigation and laid charge before court.

3. The court, before which final report was laid took cognizance of the offence. Finding that the case is one exclusively triable by a court of Sessions, the said court committed the case to Sessions Court, Kasaragod under Section 209 Cr.P.C. after following the necessary procedures. The said court made over the case to Additional Sessions Court (Adhoc) II, Kasaragod for trial and disposal.

4. The latter court, on receipt of records and on appearance of the accused framed charge for the offence already made mention of. To the charge, the accused pleaded not guilty and claimed to be tried. The prosecution therefore had P.Ws.1 to 6 examined and had Exts.P1 to P8 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., in which he denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent. He further stated that he had

nothing to do with the articles produced before court and he was not in the place at the time as alleged by the prosecution. According to him, out of vengeance he has been falsely implicated. 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. The court below, greatly impressed by the evidence of P.Ws.1 and 2 and Ext.P2 mahazar which contained the complete details of what had transpired at the place, found that the prosecution has succeeded in establishing the case beyond doubt and conviction and sentence as already mentioned followed.

6. Assailing the conviction and sentence, learned counsel for the appellant contended that even though the detection was on 27.3.2000, the articles were produced before the court below on 30.3.2000, three days after the incident for which there is no satisfactory explanation. This Court in the

decision reported in Ramankutty v. Excise Inspector, Chelannur Range (2013(3) KHC 308) held that even a day's delay is fatal. It is true that a Division Bench of this Court had occasion to consider as to what is meant by 'production forthwith'. If there is any delay that should be satisfactorily explained.

7. In the case on hand, apart from the above fact, forwarding note produced by the prosecution does not contain the sample seal. This Court had occasion to consider the consequence of the forwarding note without affixing sample seal in the decision reported in Krishnan v. State (2015(2) K.L.T. SN 8) wherein it was held as follows:

“Ext.P5 is a copy of the Forwarding Note submitted before the court for sending sample for subjecting it to chemical analysis. A specific space is provided in the Forwarding Note for affixing the sample seal. No such sample seal was affixed on Ext.P5. Whether the sample seal was affixed on the original of Ext.P5 sent to the Chemical Examiner? Normally, if the sample seal is not

appearing in the copy of the Forwarding Note, in this case it is Ext.P5, it has to be presumed that such sample seal was not affixed on the original Forwarding Note unless proved otherwise. A copy of the Forwarding Note is kept in the office of the court for serving certain purposes. The purposes are evidence from the contents of the form of the Forwarding Note itself. They include the quantity and description of the sample drawn from the bulk of the contraband, the details of the case and the space for providing the sample impression of the seal affixed on the sample taken from the bulk of the contraband. Therefore, as already stated, the absence of sample seal in the space provided in the copy of the Forwarding Note. Is sufficient reason for presuming that the sample seal is not provided in the original Forwarding Note. Of course, this is only a rebuttable presumption. In the case on hand, such presumption has not been rebutted by the prosecution.”

8. Even assuming that evidence of P.Ws. 1 and 2 and Ext.P2 can be accepted, the above two infirmities stare at the face of the prosecution, to which there is no explanation for the prosecution. In the light of the decisions referred to

above, it is difficult to sustain the conviction and sentence.

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 appellant is not guilty of the offence alleged against him. He stands acquitted of the charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

P. BHAVADASAN,
JUDGE

sb.