

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 6TH DAY OF OCTOBER 2015/14TH ASWINA, 1937

CRL.A.No. 554 of 2007 ()

**AGAINST THE JUDGMENT IN SC 1175/2005 of ADDITIONAL SESSIONS COURT FAST
TRACK-II, PALAKKAD DATED 26-02-2007**

APPELLANT(S)/ACCUSED:

**CHANDRAN, S/O. VELLA,
KAROTTUPARAMBIL VEEDU, PANAGATTIRI, ELAVANCHERRY
CHITTUR, PALAKKAD.**

**BY ADVS.SRI.SAJAN VARGHEESE K.
SRI.M.N.SAJEER
SRI.LIJU. M.P**

RESPONDENT(S)/COMPLAINANT:

**STATE OF KERALA, REP. BY THE
EXCISE INSPECTOR, NEMMARA EXCISE RANGE, PALAKKAD
REP. BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA
ERNAKULAM.**

BY PUBLIC PROSECUTOR SRI. C.K. JAYAKUMAR

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 06-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 554 of 2007

Dated this the 06th day of October, 2015

J U D G M E N T

The accused was prosecuted for the offences punishable under Section 55(a) read with Section 8(2) of the Abkari Act. He was found guilty. He was convicted and sentenced to suffer simple imprisonment for a period of one year and to pay a fine of ₹1 lakh with a default clause of simple imprisonment for a period of three months. Set off as per law was allowed.

2. The prosecution case is as follows:

PWs 3 and 4, among whom PW3 was the Excise Inspector, had gone on routine patrol duty and at 6.00 p.m. on that day, when they reached the place of occurrence, he happened to see a person coming with a can in his hand. In the presence of witnesses, he was intercepted and the can in his possession was seized. It was found to contain two litres of liquid which on examination found to be arrack.

PW3 then took samples and had the same sealed and affixed labels containing the signature of the accused, witnesses and himself. The balance quantity left after taking the samples was also sealed and labelled as above. PW3 then returned to the Station and registered Crime No. 1/2000. Ext.P1 is the seizure mahazar said to have been prepared by him with regard to the incident and Ext.P2 is the arrest memo. Ext.P3 is the crime and occurrence report. He had the articles seized forwarded to the court as per Ext.P4. He filed Ext.P5 forwarding note and as a result of which article was sent for chemical examination. He identified the can as MO1. PW5 conducted investigation of the case. He was the then Excise Circle Inspector of Chittur Range. He says that he had recorded the statements of PW3 on 20.11.2004 and rest of the four witnesses on 28.11.2004. According to him, he called on the witnesses to his office and taken down their statement. He claims to have gone the place of occurrence and got the sketch prepared which is marked as Ext.P6.

Chemical analysis report is Ext.P7. After completing investigation, he laid final report before court.

3. The court before which the final report was laid took cognizance of the offence and on finding that the offences are exclusively triable by a Court of Sessions, committed the case to Sessions Court, Palakkad. The said court made over the case to Additional Sessions Court, Palakkad for trial and disposal.

4. The latter court on receipt of records and appearance of the accused, framed charges for the offences punishable under Section 55(a) read with Section 8(2) of the Abkari Act.

5. To the charge, the accused pleaded not guilty and claimed to be tried. The prosecution therefore examined PWs 1 to 5 and had Exts. P1 to P7 was marked. MO1 was got identified and marked.

6. After the close of prosecution evidence, the 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 claims to have been falsely implicated.

7. Finding that he could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. He examined DW1 and had Ext.D1 marked.

8. The court below, greatly impressed by the evidence PWs 3 and 4 and prompt production of the accused and the articles before court soon after the incident, felt that the prosecution has succeeded in establishing the case against the accused and therefore found him guilty. Conviction and sentence as already mentioned followed.

9. The learned counsel appearing for the appellant assails the conviction on several grounds. The learned counsel pointed out that the detection of the offence was on 04.01.2000 and the investigation in the case by PW5 started only in 2004 i.e after four years of the incident. There is no explanation offered for this unusual delay in investigating

the case and that itself vitiates the proceedings. In support of his contention, the learned counsel relied on the decision reported in **Krishnan H. v. State of Kerala** (2015 (2) KLT 11). The learned counsel for the appellant also drew attention of this Court to the fact that going by Section 50 of the Abkari Act, the investigation has to be conducted as soon as possible and final report has been filed at the earliest. This mandate of the Act has been violated in the case on hand and relying on the decision reported in **Majeedkutty v. Excise Inspector** (2015 (1) KLT 624) it is contended that, that vitiates the proceedings. Further it is pointed out that even though the sample is alleged to have collected on 04.1.2000, it was forwarded to the chemical analysis laboratory only after one year and there is no explanation offered for delay in forwarding the samples for chemical examination.

10. Finally, it is pointed out that the claim made by PW5 that he had recorded the statement of witnesses is

factually incorrect as could be seen from Ext.P1 document. PW5 claimed that he had called the witnesses to his office and questioned them on 20.11.2004 and 28.11.2004. Referring to Ext.D1, the learned counsel pointed out that the GD kept in the concerned station does not show that these witnesses were present at the Circle Office as claimed by PW5 and therefore, his claim that statement had taken on those days is baseless. In short, it is clear from the evidence, according to the learned counsel, that there has been practically no investigation of the case and records were simply drawn up by PW5 and a final report has been filed. This would cause considerable prejudice to the accused and he is entitled to be acquitted.

11. The learned Public Prosecutor very vehemently chose to cross the contentions raised by the learned counsel for the appellant and chose to sustain the conviction and sentence. The learned Public Prosecutor pointed out that the accused and the documents were produced promptly

before the court and Ext.P1, the contemporaneous seizure mahazar contained all the details spoken to by PW3. These facts persuaded the court below to come to the conclusion that prosecution version is correct and that there was no manipulation. The mere delay in conducting investigation cannot be a ground for acquittal since it has caused no prejudice to the accused. Accordingly, it is contended that the conviction and sentence are also to be sustained.

12. The detection of the offence is spoken to by PWs 3 and 4, who are the Excise Officers and who had gone on patrol duty on 04.1.2000. Both of them say about having seen the accused coming along the road carrying a can and his interception by the Excise Officers. Their evidence is uniform with regard to the fact that the can was found to contain two litres of arrack and also that the accused was arrested from the spot and arrest memo was prepared. Both of them say about having prepared the seizure mahazar also. PW3 would then say that he returned to the Station

and registered crime as per Ext.P3 occurrence report. PW3 also says that on the very next day itself, the accused and the articles were produced before court.

13. It is true that the learned Public Prosecutor is justified in his submission that the prompt production of the accused and the relevant documents give considerable strength to the prosecution case. The fact that there was considerable delay in conducting investigation cannot be overlooked. Section 50 of the Abkari Act mandates that the investigation shall be completed immediately and the final report shall be filed as early as possible. In the case on hand, it has to be noticed that PW3, who detected the offence, was also competent to investigate the case. But for reasons best known to him, he did not do anything in the matter except registering the case. It was left to PW5, who took charge of the Circle Inspector of Chittur Excise Range in 2003 to start investigation of the case in 2004. The witnesses were examined on 20.11.2004 and 28.11.2004 i.e.

four years after the incident. No explanation is offered for this unusual delay in conducting investigation. There is nothing to show that there was no other officer competent to investigate the case during the period from 04.01.2000 to 20.11.2004.

14. There seems to be considerable force in the submission made by the learned counsel for the appellant that in fact no statements of witnesses have been taken and the statement produced before court are all self made documents. The evidence of PW5 shows that all the witnesses were called to his office. But the evidence of PW4 is to the effect that he was summoned to Nemmara Office and his statement was taken from Nemmara, while at the relevant time PW5 was the Circle Inspector of Chittur Excise Range. Then again the GD which is marked as Ext. D1, does not show the presence of any of the witnesses in the Police Station on the date on which the statements are alleged to have been taken.

15. This Court had occasion to consider the necessity for prompt investigation of the case in the decision reported in **Majeedkutty v. Excise Inspector** (2015 (1) KLT 624) wherein, it was held as follows:

“Section 50 of the Abkari Act deals with the investigation of the case and forwarding of report to the Magistrate. This Section reads as follows:

“50. Report of Abkari Officer gives jurisdiction to a competent Magistrate:-- (1) Every investigation into the offence under this Act shall be completed without unnecessary delay.
(2) As soon as investigation into the offences under this Act is completed, the Abkari Officer shall forward to a Magistrate, empowered to take cognizance of the offence on a police report, a report in accordance with sub-section (2) of Section 173 of the Code of Criminal Procedure, 1973 (Central Act 2 of 1974).”

Section 50 thus shows that investigation into the offence shall be completed without delay. As soon as the investigation is completed, the Abkari Officer has to forward a report in accordance with sub-section (2) of Section 173 of Cr.P.C. In the light of Section 50, a Final Report under Section 173 of Cr.P.C. can be submitted only after completing he

investigation of the case. Therefore, investigation is a prerequisite for forwarding a Final Report to the concerned Magistrate under sub-section (2) of Section 173. In the case on hand, the investigating agency has not conducted an investigation into the offence alleged as contemplated under Section 50 of the Abkari Act. This is a serious irregularity committed by the investigating agency in this case. This lapse itself is sufficient for rejecting the prosecution case and acquitting the appellant of the offence alleged against him.”

16. This issue was again considered in **Krishnan H. v. State of Kerala** (2015 (2) KLT SN 11), wherein it was held as follows:

“The alleged occurrence was on 04/11/1999. PW1 handed over the accused, contraband and the records to PW2 on that day itself. PW2 was the Excise Inspector, Excise Range Office, Hosdurg, at that time. So, he was a competent Abkari Officer to conduct investigation of this case. Why he had not conducted investigation? The prosecution has not given any explanation as to why PW2 had not conducted investigation. Thereafter, when the investigation had taken place? PW3 stated

that he had taken over the investigation of this case on 30/06/2000, i.e., after a period of about 8 months. S.50 of the Abkari Act mandates that investigation into the offence shall be conducted and completed without unnecessary delay. Here, in this case, the long delay in conducting the investigation is writ large. The prosecution has not offered any explanation for this inordinate delay in conducting the investigation. This aspect of the matter also cannot be brushed aside.”

17. It is interesting to note that PW4 in his cross examination stated that he had given statement with regard to sealing of the sample, labelling of the same etc. to PW5. But it was brought to his notice that his statement did not contain any of these details. When PW5 was questioned, he stated that these details are not spoken by PW4 to him.

18. There is a violation of mandate of prompt investigation as contemplated in Section 50 of the Abkari Act and no explanation is offered for the unusual delay in conducting investigation when PW3 himself was competent to investigate the case. The delay in conducting

investigation should prove fatal to the prosecution as referred to in the above decision. Apart from the fact that there is considerable delay in conducting the investigation, the very claim of PW5 that the witnesses were summoned to the Circle Office is also doubtful. The learned counsel for the appellant is fully justified in his submission that it is extremely doubtful whether there has been any investigation at all in this case.

For the above reasons, this Court is unable to concur with the finding of the court below that the prosecution has succeeded in establishing the case against the accused beyond reasonable doubt. This appeal is allowed. The conviction and sentence passed by the court below are set aside. His bail bond shall stand cancelled and he is set at liberty.

Sd/-
P.BHAVADASAN
JUDGE

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P.A. to Judge