

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 1ST DAY OF OCTOBER 2015/9TH ASWINA, 1937

CRL.A.No. 1030 of 2006 ()

**AGAINST THE JUDGMENT IN SC 279/2003 of ADDITIONAL SESSIONS COURT
(ADHOC)-I, KALPETTA**

APPELLANT(S)/ACCUSED:

**VELUKKAN, S/O. KOLUMBAN,
AGED 53 YRS, BASTHIPOYIL PANIYA COLONY
ANCHUKUNNU P.O., ANCHUKUNNU VILLAGE, MANANTHAVADY.**

BY ADV. SRI.SHAIJAN C.GEORGE

RESPONDENT(S)/COMPLAINANT:

**STATE OF KERALA, REPD. BY
PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.**

BY PUBLIC PROSECUTOR SRI. C.K. JAYAKUMAR

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 01-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 1030 of 2006

Dated this the 01st day of October, 2015

J U D G M E N T

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

2. The incident, according to the prosecution, is alleged to have taken place on 27.12.2002. PW1, at the relevant time was working as the Preventive Officer in Excise Enforcement and Anti-Narcotic Special Squad of Wayanad District. At about 4.00 p.m., on that day, while he was on patrol duty along with other officers, he received information that in front of the well of Grama Panchayath near the Paniya Colony, the accused was engaged in the sale of illicit liquor. When they reached near the well, a

person carrying a can was seen standing near the well and as soon as he noticed the officers of the Excise Department, he tried to make good his escape. His escape was effectively prevented and the article was seized. His can had a capacity of 2½ litres in which some liquid was found by PW1. By smell and taste of the contraband article, it was revealed that, that was arrack. As per Ext.P1 arrest memo, the accused was arrested. A sample was taken by PW1 and that was sealed and label was affixed containing the signature of the accused, witnesses and PW1. The balance quantity was also sealed and labelled as above. PW1 entrusted the accused and the seized articles with the Manathavady Excise Range Officer. PW5, the Excise Range Officer to whom the accused and the articles were entrusted, registered Crime No. 29/02 as per Ext.P3 occurrence report. He claims that the articles and accused were produced before the court on the very next day and Ext.P4 is the property list. He prepared forwarding note

which is marked as Ext.P5. PW6, the preventive officer at Excise Range Office, Mananthavady as per the direction of the superior officer took over investigation of the case on 31.01.2003. He recorded statement of witness and prepared the scene mahazar, Ext.P6. His successor in office PW7 verified the records, obtained Ext.P7 chemical analysis report and laid charge before court.

3. The court before which the final report was laid, took cognizance of the offence. Finding that the offence is exclusively triable by a Court of Sessions, the said court committed the case to the Sessions Court, Kalpetta under Section 209 of Cr.P.C. The Sessions Court, made over the case to Additional Sessions Court (Ad hoc)-I, Kalpetta, for trial and disposal.

4. The latter court, on receipt of records and appearance of accused before it, framed charges for the offence punishable under Section 55(a) of the Abkari Act to which the accused pleaded not guilty and claimed to be

tried. The prosecution therefore had PWs 1 to 7 examined and Exts.P1 to P7 marked. MO1 was got identified and marked.

5. 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 also added that when PW1 wanted to buy his brother-in-law's property, he opposed the same and therefore he was falsely implicated in the case.

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

7. Finding the evidence of PWs 1 and 2 taken along with Ext.P2 to be convincing enough, the court below entered a finding that the prosecution has succeeded in establishing the case against the accused. Accordingly, conviction and sentence as already mentioned followed.

8. Assailing the conviction and sentence, the learned counsel for the appellant contended that even though PW1 would say that he had entrusted the articles seized and the accused on the date of seizure itself to PW5 and though PW5 claims it to be true, it is seen from the records that the property was produced only on 04.01.2003 whereas, the date of detection is 27.12.2002. The delay in production of the property before court remains unexplained and that is fatal to the prosecution. Even though PW5 stated that he had all the documents and accused produced before court on the very next day itself, it is belied by the endorsement found on the property list to show that the property was received by the court only on 04.01.2003. The learned counsel for the appellant also pointed out that the forwarding note does not contain the specimen seal of the officer concerned. Further, the learned counsel also pointed out that PW3, one of the attesting witnesses who stood by the prosecution stated that the accused was arrested from

the courtyard of his house, whereas the evidence of PWs 1 and 2 the strong prosecution witnesses, is to the effect that he was arrested from near the well situated near the Paniya Colony. These incongruities and infirmities in the evidence have been conveniently overlooked by the court below and they are so significant to make the prosecution version open to considerable doubt. The court below has not appreciated the evidence in the proper perspective and that has resulted in a wrong conviction being entered into.

9. The learned Public Prosecutor on the other hand made a valiant attempt to sustain the conviction and sentence. It was pointed out that going by the evidence of PW5, it is very clear that the documents, the accused and all other property which were entrusted to him by PW1 on 27.12.2002 were produced before court on 28.12.2002 itself. There is no reason to disbelieve him. Further, Ext.P2 the contemporaneous document prepared by PW1 contains all the details and there is no reason to disbelieve PW1 in this

regard. At any rate, learned Public Prosecutor pointed out that the lower court found the evidence of PWs 1, 2 and 5 to be convincing enough and there is no reason as to why this Court should take a different view with regard to the appreciation of the evidence of those witnesses. The prosecution has succeeded in establishing the case against accused and no interference is warranted.

10. It is true that PWs 1 and 2 give a uniform version about the incident. PW1, as already stated was the then preventive officer attached to the District Excise Enforcement and Anti-Narcotic Special Squad of Wayanad District. While he along with PW2 and other officers were on patrol duty, according to PWs 1 and 2, they received reliable information about the accused vending in illicit liquor near the well situated in the Paniya Colony. PWs 1 and 2 give a uniform version that they proceeded to the place and found the accused standing there with a can in his hand. Both of them say that he tried to make good his

escape which was effectively prevented and the can was seized from his possession. It was found to contain a liquid which on verification turned out to be arrack. PWs 1 and 2 speak about the sampling and labelling on the sample as well as the balance quantity in accordance with law. PW1 is definite that on the very same day, evening itself, he had entrusted all the articles and the accused to PW5.

11. PW5 also says that he had received the articles and the accused on the very same day itself and he is categorical in his submission that all the documents and the accused were produced before the court on the very next day itself.

12. The attention of PW5 was drawn to the fact that going by the endorsement on the property list made by the court, it is seen to have been received in court on 04.01.2003 for which PW5 had no reasonable explanation. From the endorsement on the property list, it is evident that the property was produced only on 04.01.2003 since the

endorsement on that document to return the article for safe custody to PW5 is seen dated 04.01.2003. It is difficult to believe that had the property been produced on 28.12.2002, it would have been kept in the court till 04.01.2003 to make an endorsement to return it to be kept in safe custody on 04.01.2003.

13. PW6 is the Investigating Officer. He was confronted with the endorsement on the property list for which he had no reasonable explanation. He stated that as per his information and the documents perused by him, the accused and all the materials seized during seizure were produced before court on 27.12.2002. However, he had to admit that the endorsement on the property list shows that the memos were received only on 04.01.2003. He also stated in the cross examination that PW5 had not categorically told him that he had taken possession of the articles and the accused as spoken to by PW1.

14. The consequence of unexplained delay in

producing the properties before court was considered in the decision reported in **Ramankutty v. Excise Inspector, Chelannur Range** (2013 (3) KHC 308). Of course, a Division Bench of this Court had occasion to consider a similar issue with an explanation of the word 'forthwith' as available in Section 102 of the Cr.P.C.. Though the Division Bench of this Court explained the term 'forthwith' as 'not immediately', the Division Bench was cautious enough to say that any delay in production of the articles before court has to be explained by the prosecution and the explanation must be acceptable and reasonable.

15. Even assuming that some allowance could be given for the non production of the articles on the next day or thereafter, the delay of six days cannot be easily overlooked. In the decision reported in **Ramankutty v. Excise Inspector, Chelannur Range** (2013 (3) KHC 308), it was held that unexplained delay in producing the contraband before the court after seizure is fatal to

prosecution case.

16. In the light of the fact that the principles laid down in the above decision applies with all force to the facts of the case, there is no reason as to why the same benefit should not be given to the accused in this case also being similarly placed as in the reported decision.

17. Since the prosecution has no explanation for the delay in producing the articles before court, the appellant is entitled to succeed in this appeal.

For the above reasons, this appeal is allowed. The conviction and sentence passed by the court below is set aside and it is held that the prosecution has not succeeded in establishing the case beyond reasonable doubt against the accused. He shall stand acquitted of the charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

Sd/-
P.BHAVADASAN
JUDGE

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