

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 8TH DAY OF OCTOBER 2015/16TH ASWINA, 1937

CRL.A.No.633 of 2007 (E)

AGAINST THE JUDGMENT IN SC 850/2005 of ADDL.SESIONS COURT FAST
TRACK-II, PALAKKAD DATED 30.03.2007.

APPELLANT/ACCUSED:

CHANDRAN, AGED 36 YEARS, S/O. KURUNGA,
POOKKOTTUKULAMBU, PERUKULAMPALLIYAL VEEDU,
EDAPPALAM DESOM, VILAYUR VILLAGE, OTTAPALAM TALUK,
PALAKKAD DISTRICT.

BY ADVS.SRI.RAJESH SIVARAMANKUTTY
SRI.P.K.MOHANAN (PALAKKAD)

RESPONDENT/COMPLAINANT:

STATE OF KERALA, REPRESENTED BY
EXCISE INSPECTOR, PATTAMBI EXCISE RANGE,
(CRIME No.28/02), PALAKKAD DISTRICT, BY PUBLIC
PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY SMT.S.HYMA, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
08-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.633 OF 2007

Dated this the 8th day of October, 2015.

J U D G M E N T

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

2. Incident is said to have occurred on 21.11.2002. On that day, at about 5.45 p.m, PWs 1 and 2 along with other officers had gone for patrol duty and they happened to see a person coming along the road with a can having a capacity of 2 litres. When he saw the Excise Officials, he tried to retreat and that caused suspicion in the mind of the officers. They seized the can from him and examined the contents. On examination, it was revealed that it was arrack. The accused was arrested. From the contraband article, 300ml of sample was taken and the

personal seal of PW1 was affixed on the same. PW1 also had the labels showing the details affixed on both the sample as well as on the can and on the label, he and the accused had affixed their signatures. PW1 then returned to the office and entrusted the article and the accused to the Preventive Officer who was in charge of the Station. PW1 had taken care to prepare seizure mahazar which is marked as Ext.P2. Ext.P3 is the crime and occurrence report prepared by the Preventive Officer in charge of the Station and Ext.P4 is the remand report signed by him. Exts.P5 and P6 are the property list and the forwarding note. It appears that long thereafter, in 2004, PW4 had taken over the investigation. He prepared a plan, recorded statement of witnesses, completed investigation and laid charge before court.

3. The court before which final report was laid took cognizance of the offence. On finding that the offence is exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Palakkad under Section 209 Cr.P.C after following necessary procedures. The said court made over the case to Additional Sessions Court Fast Track-II, Palakkad 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) read with Section 8(2) of Abkari Act. To the charge, accused pleaded not guilty and claimed to be tried. The prosecution therefore had PWs 1 to 4 examined and Exts.P1 to P8 marked. M.O.1 was got identified and marked.

4. After the close of the prosecution evidence, accused was questioned under Section 313 Cr.P.C wherein he denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent. He had Exts.D1 to D4 marked.

5. Presumably, court below impressed by the evidence of PWs 1 and 2 taken along with the contemporaneous document namely, Ext.P2 came to the conclusion that the prosecution has succeeded in establishing the case against the accused. Accordingly, convicted and sentenced the accused as already mentioned.

6. Assailing the conviction and sentence, learned counsel appearing for the appellant contended that it is significant to

notice that going by the evidence of PW1, after having detected the offence, he returned to the Station and entrusted the thondi article and the accused and the documents to the Preventive Officer in charge of the office at the relevant time. It is he who had prepared the occurrence report on the next day and produced the accused before court with remand report. The said officer also prepared the forwarding note to send the sample for chemical analysis.

7. It is surprising to note, according to the learned counsel for the appellant, that even though a major portion of the investigation has been done by Gopinathan, Preventive Officer in charge of the Station at the relevant time, he was not examined and therefore considerable prejudice is caused to the accused. There is no evidence to show as to who was in custody of the article after 7 p.m on 21.11.2002 till they were produced before court on the next day. This latches on the part of the prosecution, according to the learned counsel, is sufficient to justify an acquittal.

8. Learned Public Prosecutor, on the other hand, contended

that evidence of PWs 1 and 2 are uniform and consistent regarding the incident and they get support from Ext.P2 seizure mahazar. The mere fact that Gopinathan was not examined is not a ground to acquit the accused. The articles were promptly produced before court so also the accused. That gives creditworthiness to the prosecution. In short, according to the learned Public Prosecutor, there are no grounds made out to interfere with the judgment of the court below.

9. The evidence of detection rests on the testimony of PWs 1 and 2. PW1 says that he was on patrol duty in a car arranged by Gopinathan, Preventive Officer in charge, and at that time he happened to see the accused coming along the road with a can in his hand. PW2 also says the same thing. PW1 then says about he having intercepted the accused and seized can from his possession. Both of them say that the contents were examined and they were satisfied that it was arrack. PWs 1 and 2 are in unison in their testimony that sample was taken by PW1 and it was sealed and labeled at the place of incident. They would also say that can was also sealed and label was affixed on it. Even

though PWs 1 and 2 were cross examined at length, nothing is brought out in their evidence to show that they are speaking falsehood. Their evidence gets sufficient corroboration from Ext.P2 which narrates the entire details as spoken to by PWs 1 and 2. The court below found that their evidence is sufficient to warrant a conclusion that offence has been made out.

10. It is not in dispute that even though offence was committed on 21.11.2002, occurrence report was drawn up on 22.11.2002. Forwarding note and property list were prepared by the officer to whom the accused and the thondi articles were entrusted by PW1 on the previous day. PW1, in cross examination, stated that after returning to the Station, he had entrusted the article and the accused and the documents to Gopinathan, Preventive Officer who was in charge of the Station at the relevant time. According to PW1, what transpired thereafter is within the personal knowledge of Gopinathan. The records indicate that occurrence report was drawn up by Gopinathan. Forwarding note was prepared by him and also that he had caused production of accused before the court below. It

cannot be disputed therefore that he had a vital role to play in the incident. Still, for reasons best known to the prosecution, they did not examine that witness thereby the accused was deprived of the opportunity to ascertain whether what is stated by PW1 is true or not. Normally, in the case of this nature, investigation is done by the officer who is detecting the offence. Here, PW1 is definite that after sample was taken, they returned to the Police Station and entrusted the article, accused and documents to Gopinathan, Preventive Officer. Gopinathan had therefore necessarily to be examined to ensure that what PW1 says is true. In the absence of any evidence to show that Gopinathan was not available for examination, argument advanced by the learned counsel for the appellant seems to be formidable. It was Gopinathan who had drawn up most of the documents and had the article produced before court. It could have been easily found out where the articles were kept between 7 p.m on 21.11.2002 till they were produced before court, had Gopinathan been examined. This is evident from the cross examination of PW1 wherein he specified that all those details

were in the personal knowledge of Gopinathan. Shockingly enough, PW4, investigating officer, did not feel it necessary to question Gopinathan.

11. One cannot dispute that Gopinathan is a person who is deeply involved in the case. Therefore, he ought to have been examined. PW1 is unable to give answer to the query put in the cross examination relating to the documents prepared by Gopinathan. There is no evidence to show as to whose custody articles were in between 7 p.m on 21.11.2002 till they were produced in court on the next day. Under these circumstances, it is difficult to accept the finding of the court below that the evidence of PWs 1 and 2 taken along with Ext.P2 are sufficient to warrant a conclusion that offence has been committed. Apart from the fact that PW4 had conducted investigation, he thought it unnecessary to examine Gopinathan who, as already stated, was the Station House Officer at the relevant time and to whom PW1 claims to have entrusted the article and the accused.

12. Under these circumstances, it could not be said that no prejudice is caused to the accused due to the non examination of

Gopinathan. It is difficult to accept the finding of the court below that merely based on the evidence of PWs 1 and 2 and also on the contents of Ext.P2, accused can be found guilty.

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 prosecution has not succeeded in establishing the case against the accused. He is acquitted of the charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

Sd/-

**P.BHAVADASAN
JUDGE**

smp

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P.A to Judge.