

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 16TH DAY OF NOVEMBER 2015/25TH KARTHIKA, 1937

CRL.A.No. 1115 of 2006

AGAINST THE JUDGMENT IN SC 194/2002 of ADDL. SESSIONS COURT
(ADHOC)-II, KALPETTA DATED 08-06-2006

APPELLANT/ACCUSED:

ABRAHAM, S/O. ULAHANNAN,
AGED 57, KALLAMPLACKAL HOUSE, PAYYAMPALLY P.O.,
KATTIKULAM (VIA), WAYANAD DIST.-670 646.

BY ADV. SRI.S.SREEKUMAR

RESPONDENT/COMPLAINANT:

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

BY SMT. S. HYMA, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
16-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.1115 OF 2006

Dated this the 16th day of November, 2015.

J U D G M E N T

The accused was prosecuted for the offence punishable under Section 55(a) of Abkari Act. He was found guilty and was therefore convicted and sentenced to suffer simple imprisonment for five years and to pay a fine of Rs.1 lakh with default clause of simple imprisonment for six months. Set off as per law was allowed.

2. On 15.01.1998, PW6, who was working as Excise Inspector of Mananthavadi Excise Range Office, along with PW5, Preventive Officer, had gone for routine patrol duty. When they reached in front of the house of one Abraham situated at Kurukkanmoola road, they happened to see the accused coming along with a sack. Seeing the Excise Officials, he tried to conceal himself which caused suspicion in the mind of the officers. He was intercepted and the sack was seized. On examination of the contents of the sack, it was found that it contained 106 packets

of 100ml liquid. As all the packets appeared to be similar in nature, one of them was opened and by tasting and smelling, the liquid was identified as arrack. Arrest memo was prepared and accused was arrested. Two more packets were opened and the contents were emptied into a bottle having a capacity of 375ml from which 300 ml was taken as sample. It was sealed in the presence of the witnesses and the accused. Label was also affixed on the sample as well as on the balance contraband article. Ext.P1 is the mahazar prepared at the spot. Thereafter they returned to the station and registered crime as per Ext.P3 occurrence report. He prepared Ext.P4 property list and Ext.P5 forwarding note. Ext.P6 is the chemical analysis report received by him.

3. PW7 took over investigation. He recorded the statement of witnesses and prepared Ext.P2 scene mahazar. He completed the investigation. PW4 laid charge before court.

4. The court before which final report was laid took cognizance of the offence and finding that the offence is exclusively triable by a Court of Sessions, the case was

committed to Sessions Court, Kalpetta under Section 209 Cr.P.C after following the requisite procedures. The said court made over the case to Additional Sessions Court (Adhoc) II, Kalpetta for trial and disposal. The latter court, on receipt of records and on appearance of accused, framed charge for the offence under Section 55(a) of Abkari Act. The accused pleaded not guilty to the charge and claimed to be tried.

5. The prosecution therefore had PWs 1 to 7 examined and Exts.P1 to P7 marked. M.O.s 1 to 3 were got identified and marked.

6. After the close of the prosecution evidence, 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.

7. 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.

8. Finding the evidence of PWs 5 and 6 sufficient and also corroborated by the contemporaneous document namely, Ext.P1,

court below came to the conclusion that the offence has been made out. The conviction and sentence followed.

9. Assailing the conviction and sentence, learned counsel appearing for the appellant, relying on the decision in **Ramankutty vs. Excise Inspector, Chelannur Range** (2013 (3) KHC 308), contended that unexplained delay in producing the article before court is fatal to the prosecution. The reason given by PW6 for late production of article is really unacceptable. On this sole ground, the prosecution has to fail.

10. Learned Public Prosecutor, on the other hand, contended that the article produced before court though belated was sealed and therefore there was no reason to doubt the authenticity of the document. Moreover, the evidence of PWs 5 and 6 taken along with contemporaneous document establishes a doubt that the accused is dealing with contraband article. At any rate, the lower court has chosen to accept their evidence and there is no reason as to why this Court should take a different view.

11. It is true that the evidence of PWs 5 and 6 go a long

way in establishing the prosecution case. Among them, PW6 is the detecting officer and PW5 was accompanying him. They speak about seizure of sack from the accused. They say that on examination of contents of the sack, it was convinced that the sack contained 106 packets of 100ml liquid and the said liquid was arrack. PWs 5 and 6 speak about sampling done by PW6 and affixing his seal. It was PW6 who registered crime and prepared property list and forwarding note. The evidence of PW6 gets sufficient corroboration at the hands of PW5. There is nothing in their cross examination to show that they had any reason to falsely implicate the accused. Further, Ext.P1 mahazar also gives complete details about the same. The prompt production of accused before court goes a long way in favour of the prosecution. But, there is no acceptable reason as to why the prosecution took nearly a month for production of articles before court. The detection of offence was on 15.01.1998 and the articles were produced before court on 04.02.1998. Forwarding note was produced only on 24.04.1998. The reason given for delay by PW6 is that he was under orders of transfer in December

1997. Obviously, the reason given is totally unacceptable and the prosecution has miserably failed to explain the delay. In the decision in **Ramankutty vs. Excise Inspector, Chelannur Range** (2013 (3) KHC 308), it was held that the unexplained delay in producing the contraband before court is fatal to prosecution. Even though a Division Bench of this Court has held that the articles seized should be produced before court forthwith, it was taken the view that if there is any delay, that should be properly explained.

12. In the case on hand, detection of offence was on 15.01.1998 and the articles were produced before court only on 04.02.1998. The delay in producing the article certainly needs explanation. Further, evidence of PW6 while he was in box is to the effect that he had affixed temporary seal on the contraband article. But this is conspicuously absent in Ext.P1. Whatever that be, the delay remains unexplained and the consequence of delay as has been held to be fatal in the above decision has to be followed.

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. He stands acquitted of the charges levelled against him. His bail bond shall stand cancelled and he is set at liberty. If any amount has been deposited under orders of court, that shall be refunded to the accused on proper application being filed.

Sd/-

**P.BHAVADASAN
JUDGE**

smp

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P.A to Judge.