

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 14TH DAY OF OCTOBER 2015/22ND ASWINA, 1937

CRL.A.No. 671 of 2007 ()

**AGAINST THE JUDGMENT IN SC 16/2001 of ADDITIONAL SESSIONS COURT
(ADHOC)-II, KALPETTA DATED 26-02-2007**

APPELLANT(S)/ACCUSED.:

**P.K.VIJAYAN, S/O.RAJAN NAMBIAR,
HINDU KURICHIYA, PERIAYA, WYNAD DISTRICT.**

**BY ADVS.SRI.M.ASOKAN
SRI.DEVAPRASANTH.P.J.**

RESPONDENT(S)/COMPLAINANT.:

**STATE OF KERALA, REPRESENTED BY
EXCISE INSPECTOR, MANANTHAVADY EXCISE RANGE
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA.**

BY PUBLIC PROSECUTOR SMT. S. HYMA

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 14-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl. No. 671 of 2007

Dated this the 14th day of October, 2015

J U D G M E N T

The accused was found guilty of the offence punishable under Section 55(g) of the Abkari Act and consequently he was convicted and sentenced to suffer rigorous imprisonment for a period two years and to pay a fine of ₹ 1 lakh with a default clause of six months.

2. The prosecution case in brief is that on 26.08.1998, while PW1, who was functioning as Preventive Officer of Mananthavady Excise Range Office, he had gone on patrol duty along with other officers. While patrolling, they received reliable information that the accused was distilling illicit liquor in his coffee plantation. On reaching the house of the accused, PW1 found the accused in the coffee plantation and he looked as if engaged in some activity. He approached him and intercepted him. On examination, it was found that an aluminium utensil having

30 litres capacity had about 25 litres of liquid in it. By taste and smell, it was recognized as wash. On the basis of Ext.P1 arrest memo, the accused was arrested and thereafter, 300 ml of liquid was taken as sample in a 750 ml bottle and that was sealed and labelled. The label contained the signature of the accused, witnesses and PW1. After taking the sample, the balance quantity was destroyed at the place of occurrence itself. It is also stated that even on the utensil recovered as MO1, the officer concerned had affixed the label containing the signature of the accused, witnesses and himself. Ext.P2 seizure mahazar was prepared on the spot and PW1 returned to the Excise Range Office along with the accused, the documents prepared by him and also the materials recovered by him. He handed them over to the officer in charge of the Station. The Excise Inspector in charge of the station registered crime as per Ext.P3 occurrence report. The articles were produced before court on 14.09.1998. Ext.P4 is the property list. Ext.P5 is the

forwarding note and Ext.P6 is the chemical analysis report. PW7 conducted investigation in the case. He visited the place of occurrence and prepared Ext.P7 scene mahazar. He recorded statement of witnesses, completed investigation and laid final report before court.

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

4. The latter court, on receipt of records and appearance of the accused before the said court, framed charges for the offence punishable under Section 55(g) of the Abkari Act.

5. To the charge the accused pleaded not guilty and claimed to be tried. The prosecution therefore had PWs 1 to

8 examined and Exts.P1 to P7 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 was innocent. He denied having committed any act as alleged by the prosecution.

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. Presumably acting on the basis of the testimony furnished by PWs 1 and 2, taken along with Ext.P2 seizure mahazar, the court below formed the opinion that the prosecution has succeeded in establishing the case against the accused and therefore he was convicted and sentenced as already mentioned.

9. Assailing the conviction, the learned counsel appearing for the appellant contended that there is considerable delay in producing the seized articles before court and that the delay is unexplained. The person who is alleged to have registered the crime and who is alleged to have taken custody of the accused, documents and materials from PW1, was not questioned by the Investigating Officer nor was he shown as the witness in the final report filed before court. After the Investigating Officer was examined, PW8 was introduced and he was made to speak to the effect that it was he who was the Excise Inspector at the relevant time and it was he who received the custody of the accused, articles and documents from PW1. The learned counsel would point out that this is clearly an afterthought and the fact that the Investigating Officer did even bother to question him shows the falsity of the claim made by PW8. The learned counsel also pointed out that PWs 1 and 2 are categorical and definite in their testimony that the label

containing the signature of the accused, witnesses and PW1 was affixed on MO1 also. PWs 1 and 2 when examined in court had to conceded that no such label was available on MO1. These infirmities in the evidence have been conveniently overlooked by the court below even though they are fatal to the prosecution. This Court in the decision reported in **Ramankutty v. Excise Inspector, Chelannur Range** (2013 (3) KHC 308) had occasion to consider the delay in producing the seized articles before court. Holding that even a day's unexplained delay is fatal, the court reversed the finding of the trial court. In the case on hand, according to the learned counsel, the delay is of 14 days and it remains unexplained. On that sole ground, the conviction cannot stand.

10. The learned Public Prosecutor on the other hand supported the findings of the court below and contended that the mere fact that PW8 was not shown as the witness in the witness list and was subsequently examined does not

enable the accused to contend for a position that he was not involved in the registration of crime. The mere fact that PW8 is not shown as a charge witness also does not help the accused. Further, it is contended by the learned Public Prosecutor that reasonable explanation has been offered for the delay in production of the articles before court. It was after evaluating the evidence furnished by PWs 1 and 2 and taking note of the contemporaneous documents and also that the evidence of PW8 which was found credit worthy that the court had entered a conviction. It is contended that there are no grounds to interfere with the conviction and sentence passed by the court below.

11. After having heard the learned counsel for the appellant and the learned Public Prosecutor and after having perused the records and after evaluating the evidence in the case, there seems to be considerable force in the submission made by the learned counsel for the appellant.

12. It is not in dispute that PW1 detected the offence on 26.08.1998. It is also not in dispute that on the same day itself, he had handed over the accused, articles seized and the documents to the Excise Inspector, who was in charge of the station. However, from the records it is clear that the articles seized were produced before court only on 14.09.1998. The explanation offered at the time of evidence is that it was due to Onam holidays and heavy work that the delay had occurred.

13. It is rather surprising to note that PW8 who claims to have functioned as the Excise Inspector at the relevant time was neither questioned by the Investigating Officer nor was he cited as the charge witness. As rightly pointed out by the learned counsel appellant, wisdom dawned too late on the prosecution and it was long after the investigating Officer was examined, that PW8 was introduced by the prosecution. Even at the time of examination of PW1, the prosecution has no idea to examine PW8 as could be evident

from a reading of the evidence of PW1. If the prosecution had intended to examine PW8 at that point of time, it was unnecessary for PW1, who had spoken about the acts done by PW8. PW1 can speak to those facts only in case PW8 is not available or there are other compelling circumstances by which a person who did those acts cannot be examined before court. No such contingency or circumstance is pointed out in the case on hand.

14. The submission of the learned counsel for the appellant that it was in order to fill the lacuna in the prosecution evidence that PW8 was introduced and examined cannot be ignored. There seems to be considerable force in the above submission.

15. Even assuming that there was an omission in naming him in the final report as the charge witness, there is no justification in the submission made by PW7 that he did not even bother to question PW8. One fails to understand what is the nature of investigation conducted by PW1, if that

be the case. Coming to the point in issue regarding delay, this Court had occasion to consider the consequences of unexplained delay in producing the articles before court. In the decision reported in **Ramankutty v. Excise Inspector, Chelannur Range** (2013 (3) KHC 308), wherein it was held that unexplained delay in producing the contraband before the court after seizure is fatal to prosecution case.

16. It is no doubt true that PW8, who was subsequently examined, has stated that it was due to Onam holidays and heavy rush that he was not able to produce the articles before court immediately. But as already stated, PW8 was subsequently named to fill up the lacuna and his evidence can be taken only with a pinch of salt. In the decision relied on by the learned counsel for the appellant, it has been clearly stated that if there is any delay, it has to be explained by the prosecution and the explanation offered should be satisfactory and reasonable. This Court is not forgetting the fact that a Division Bench of this Court had

occasion to consider the word 'forthwith' occurring in Section 102 of Cr.P.C. and held that it does not mean that immediately, but if there is any delay that needs to be explained properly.

17. In the case on hand, apart from the infirmities pointed out, the explanation offered to is not very convincing. In the light of the principle laid down in the decision referred to above, it is followed that 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 are set aside. It is held that the case against the accused is not proved beyond reasonable doubt by the prosecution. He stands acquitted of all charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

Sd/-
P.BHAVADASAN
JUDGE

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P.A. to Judge