

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 16TH DAY OF DECEMBER 2015/25TH AGRAHAYANA, 1937

CRL.A.No. 1205 of 2006

AGAINST THE JUDGMENT IN SC 497/2005 of ADDITIONAL SESSIONS COURT
(FAST TRACK - I), PALAKKAD DATED 03-06-2006

APPELLANT/ACCUSED:

KUTTAPPAN, S/O.CHAMI,
ALADI VEEDU, PANANGATTIRI DESOM, ELEVANCHERRY
VILLAGE, CHITTUR, PALAKKAD DISTRICT.

BY SRI.C.C.THOMAS (SENIOR ADVOCATE)

RESPONDENT/COMPLAINANT:

STATE OF KERALA, REPRESENTED BY
EXCISE INSPECTOR, EXCISE RANGE OFFICE, NEMMARA,
PALAKKAD DISTRICT BY PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.

BY SMT. S. HYMA, PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
16-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.1205 OF 2006

Dated this the 16th day of December, 2015.

J U D G M E N T

The accused faced prosecution for the offence punishable under Section 8 of Abkari Act. He was found guilty and was therefore convicted and sentenced to suffer rigorous imprisonment for one year and to pay a fine of Rs.1 lakh with default clause of rigorous imprisonment for six months. Set off as per law was allowed.

2. The prosecution case in brief is that on 07.06.2000 while PW1 was functioning as Excise Inspector of Nenmara Range, he along with PW2 and others had gone for routine patrol duty and at about 11.45 a.m when they reached near the house of accused, he was seen coming along the way with a bottle. He was intercepted and the bottle was seized and examined. The bottle contained about 1 litre of arrack. 300 ml was taken as sample from the contraband seized and the sample and the balance quantity were sealed and labeled. The labels contained

the signature of accused as well as PW1. Ext.P1 is the mahazar prepared at the spot. PW1 then returned to the station and as per Ext.P2 occurrence report, crime was registered. He sent Ext.P3 forwarding note to the court and obtained Ext.P4 chemical analysis report.

3. Investigation was taken over by PW5. He recorded the statement of witnesses, prepared Ext.P5 scene mahazar, completed investigation and 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, Palakkad. The said court made over the case to Additional Sessions Court Fast Track-I, Palakkad for trial and disposal. The latter court, on receipt of records and on appearance of accused, framed charge for the offence under Section 8 of Abkari Act. The accused pleaded not guilty to the charge and claimed to be tried.

5. The prosecution therefore had PWs 1 to 5 examined and Exts.P1 to P5 marked. M.O.1 was got identified and marked.

6. 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 has been falsely implicated.

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

8. The court below, mainly based on the evidence of PWs 1 and 2 and the contemporaneous document Ext.P1, found that the prosecution has succeeded in establishing the case against the accused and held the accused guilty. The conviction and sentence as already mentioned followed.

9. Learned counsel appearing for the appellant who assails the conviction pointed out that it is quite evident in the case that neither the arrest notice nor the property list is produced before court and marked. The accused had a definite case that he was not arrested from the spot and it was from somewhere else. This is fortified by the shyness on the part of the prosecution to produce arrest notice and get it marked. Even though PW1

asserts that accused was arrested from the spot, as of now there is no evidence at all. Further it is pointed out that property list which is alleged to have been prepared and along with which article was produced before court on the very same day is also not seen marked. That casts a serious doubt regarding the version of PW1 that article was produced before court on the very same day. The above infirmities, according to the learned counsel, have not been noticed by the court below and that has resulted in a wrong finding being entered into.

10. Learned Public Prosecutor, on the other hand, contended that PWs 1 and 2 gave uniform and consistent version regarding the incident and in spite of cross examination, nothing is brought out in their evidence to show that they had any motive to falsely implicate the accused. At any rate, learned Public Prosecutor pointed out that the court below which had occasion to watch the demeanour of the witnesses has chosen to accept the version given by PWs 1 and 2 and has come to the conclusion that the offence has been made out. This Court sitting in appeal, unless it is satisfied that the findings are perverse, is not justified

in interfering with the judgment of the court below.

11. After having given anxious consideration to the rival contentions and also after hearing both sides, it is felt that it is difficult to sustain the conviction. The accused had a definite case that he was a mentally retarded person and one day while he was coming to his house after work, Excise officers took him into their vehicle to their office where he was falsely implicated. He produced Ext.D1 in support of his case.

12. True, the oral evidence of DW1 coupled with production of Ext.D1 by themselves are sufficient to come to the conclusion that the accused was not sane at the time of offence. Even at that time he was undergoing treatment for mental illness. Even though the defence set up by the accused as such is not established, that will not relieve the prosecution from the obligation to prove the case beyond reasonable doubt. The case set up by the accused was stated only for the purpose of understanding the nature of defence. It is very vehemently contended that the accused was not arrested from the spot. To disprove this fact, the option available was to produce arrest

memo and arrest notice which they have not done. It is surprising to note that neither Ext.P1 nor evidence in chief examination of PW1 makes mention of preparation of arrest memo and arrest notice. The obvious conclusion therefore was that those documents were not prepared at all.

13. Equally baffling is the non production and non marking of property list. PW1 is definite that on the date of detection itself, articles were produced before court. If that be so, he should have necessarily prepared property list. But it is not seen made available to the court for examination. That assumes importance in the sense that one is not able to say when the property is produced. The only document to prove the items of properties is the property list prepared and handed over to the court by the investigating officer or the officer concerned. There was no attempt from the side of the prosecution to show with reference to the register kept in the court that property was promptly produced before court.

14. In this context, the decision in **Ramankutty** vs. **Excise Inspector, Chelannur Range** (2013 (3) KHC 308) may

have some relevance. This Court while considering the absence of arrest memo and arrest notice had occasion to doubt the prosecution case and it was held that if the arrest memo is not proved in accordance with law, the whole prosecution case must fall to ground. It was held in the said decision as follows:

"7. It is pertinent to note that the 'arrest memo', a crucial document which is required to be prepared contemporaneously at the time of arrest to show the genuineness of arrest, is seen not produced before the Trial Court. Prosecution has no case that though the arrest memo had been produced at the time of the arrest and seizure, it could not be produced before the Trial Court. So it can be safely concluded that it was not prepared at the time of alleged arrest. It is the violation of one of the mandatory requirements of arrest to be followed in all cases of arrest, which is made mandatory by the Supreme Court in *D.K.Basu v. State of West Bengal*. The specific case of the prosecution is that the Revision petitioner, while coming through a public road carrying a plastic can containing 2 litres of arrack in his hand, was arrested from a road and seized the said contraband by the Preventive Officer and party. Therefore, I am of the opinion that the arrest with the contraband in his hand is the basis of the prosecution case on which the entire case has

been built up. If the arrest is not proved beyond reasonable doubt, the entire case set up by the prosecution will fall to ground. It is also pertinent to note that there is no evidence to show that one friend or relative or other person known to him was informed of the arrest of the Revision petitioner, immediately after the arrest in compliance with another mandatory requirement of arrest in the Supreme Court decision in D.K.Basu's case. It is apposite to have a look at the said directions of the Supreme Court which read as follows:

“That the Police Officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.”

The prosecution has no case that they have

complied the said directions. I am of the opinion that the non-compliance of the mandatory requirements to be complied at the time of arrest speaks volumes doubting the genuineness of the arrest and it is fatal to prosecution case, as the seizure of the contraband has no existence at all without proving the factum of arrest, beyond reasonable doubt”.

15. Like in the decision cited above, in the case on hand also, there is no arrest memo and arrest notice produced before court. No explanation is offered for the same. One may again recall that neither Ext.P1 mahazar nor PW1 during his examination in chief says about preparation of arrest memo and giving of arrest notice. The only conclusion that can be drawn is that accused was not arrested as alleged by the prosecution.

16. If that be so, in the absence of cogent and convincing evidence regarding arrest, the principles laid down in the above decision squarely apply to this case also. Therefore, the prosecution has necessarily to fail.

For the above reasons, this appeal is allowed. The conviction and sentence passed by the court below for the offence under Section 8 of Abkari Act 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. The amount deposited by him in pursuance to the order of this Court shall be refunded to him on proper application being filed.

Sd/-

**P.BHAVADASAN
JUDGE**

smp

// True Copy //

P.A to Judge.