IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 3RD DAY OF DECEMBER 2015/12TH AGRAHAYANA, 1937

CRL.A.No. 1258 of 2006 ( )

AGAINST THE JUDGMENT IN SC 309/2003 of ADDITIONAL SESSIONS COURT (ADHOC)-I, KALPETTA

APPELLANT(S)/ACCUSED::

JOY @ VARGHESE, S/O. JOSEPH,
THENNADIYIL HOUSE, KRISHNAGIRI, SULTHAN BATHERY.

BY ADVS.SRI.LALJI P.THOMAS
SRI.S.SANTOSH KUMAR (PERUNAD)

RESPONDENT(S)/COMPLAINANT::

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

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 03-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

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Crl.A. No. 1258 of 2006

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Dated this the 03rd day of December, 2015

J U D G M E N T

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

2. The prosecution case is that PWs 1 and 2, the two preventive officers attached to Sulthanbathery Excise Range along with other officers were on routine patrol duty on 23.06.2001. On that day at about 5.15 p.m., while they were going from Nambeesankavala towards Choorimala, they happened to see the accused coming out of a bush with a black can. On seeing the Excise Officials, he became panicky and he was intercepted and the can in his possession was seized. The can had a capacity of 10 litres.

The content was examined. By taste and smell, it was identified as arrack. The can contained about 5 litres of the same. Arrest memo was prepared and he was arrested. PW1 in a clean dry bottle having a capacity of 375ml took 200ml of arrack as sample. The sample as well as the balance contraband articles were sealed and labelled as per the requisite procedures contemplated under law. The labels contained the signatures of PW1, the accused and the witnesses. PW1 prepared Ext.P2 mahazar on the spot itself. Thereafter, they returned to the Range Office and registered Crime No.25/2001 as per Ext.P3 occurrence report. On the date of incident, the accused and the contraband article were kept in safe custody by PW1 himself. On the next day which was a Sunday, the accused was produced before the Magistrate in his house and he was remanded. The property was produced before the Excise Inspector on Monday. PW5 was the Excise Inspector at the relevant time. He accepted the accused, contraband article and the documents produced before him by PW1 on 25.06.2001 itself. The property list so prepared in Ext.P4. Sample taken was sought to be sent for chemical analysis and Ext.P6 is the Chemical Analysis Report. He completed investigation and laid charge 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)-I, Kalpetta, for trial and disposal.

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

6 examined and had 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 is innocent. He added that at the relevant time he was having tea in a teashop, when the Excise Officers called him and asked him about the illicit vending of liquor in the area. When the appellant replied that no one in the area was engaged in such a nefarious activity, he was asked to get into the jeep. There was a can in the jeep. When Vijayan and Saji was asked to sign on the mahazar, they refused to do so. When the people gathered at the spot and objected to the taking away of the appellant from the spot, the Excise officers promised to leave him from the office. He denied having committed any act as alleged by the prosecution.

7. Finding that he could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. He examined DW1 in his evidence.

8. The court below found the evidence of PWs 1 and 2 to be strong enough supported by the recital in Ext.P2, the contemporaneous document and so also the Chemical Analysis Report and found no reason to suspect the prosecution case. Accordingly, the accused was found guilty. Conviction and sentence followed.

9. The main ground on which the conviction is assailed is that the case solely rests upon the evidence of PWs 1 and 2, who are Excise Officers. The learned counsel pointed out that the two independent witnesses have turned hostile to the prosecution and the prosecution gets no support from their evidence. In the absence of independent corroborative evidence, the learned counsel contended that the conviction was not safe. The second ground urged is the delay in producing the contraband article before court. It is

pointed out by the learned counsel that the contraband articles were produced only two days after the detection and there is possibility of tempering. It is therefore contended that the conviction cannot be sustained.

10. The learned Public Prosecutor on the other hand pointed out that the evidence of PWs 1 and 2 are clinching enough and gets ample support from Ext.P2, the contemporaneous document prepared by PW1 and the fact that the articles seized is the contraband article is evident from the Chemical Analysis Report. The learned Public Prosecutor pointed out that if this Court is inclined to hold that the evidence of PWs 1 and 2 are sufficient in law, then it is not necessary to look for corroboration. There is no infirmity attached to the evidence given by PWs 1 and 2 and there is no reason to suspect the prosecution case. Therefore, no grounds are made out interfere with the conviction passed by the court below.

11. The evidence regarding the detection is confined to the testimony of PWs 1 and 2, among them, PW1 was the leader of the patrol party. Both PWs 1 and 2 give a uniform version regarding the incident. According to them, while they were on patrol duty and when they reached a place called Nambeesankavala, they happened to see the accused coming along the road with a black can. Both of them say that seeing the excise team, he became panicky and tried to hide himself in the bushes nearby. He was intercepted and the can was seized from his possession and the contents were examined and it was revealed that he was carrying arrack. The 10 litres can contained about 5 litres of arrack. Both of them say that he was made aware of the fact that he had committed an offence and after preparing Ext.P1 arrest memo, he was arrested. Both of them speak about having taken sample from the contraband article and sealed and labelled the same. They also say about having sealed and labelled the balance contraband article. According to both

of them, labels contained the signatures of the accused, the witnesses and the Excise Officials.

12. Even though these witnesses were cross examined at length, nothing could be brought out in their evidence to show that they were speaking falsehood. They stood their grounds and there is nothing to show that they were giving a false story about the incident. There is nothing to indicate that they had any axe to grind against the accused or there was any previous ill-feeling between the Excise Officers and the accused.

13. The main contention taken is that except for the so called interested testimony of PWs 1 and 2, there is absolutely no evidence to justify the prosecution. Highlighting on this aspect, it was pointed out that the two independent witnesses have turned against the prosecution and that show that the prosecution story is false.

14. It is not the law that the evidence given by the Excise Officers cannot be accepted. If their evidence is

found to be convincing and cogent enough, there is no justification for rejecting their evidence on the ground that it is not corroborated by independent evidence. It is an usual practice as is seen often that the independent witnesses turn hostile, though they admit their signature on the mahazar. After all corroboration is a rule of prudence and not a rule of law. If as already stated, there is no reason to doubt the version given by PWs 1 and 2. This because the other two independent witnesses examined have refused to support the prosecution, it will not be prudent for this Court to discard the evidence of PWs 1 and 2.

15. Again, it is not as if that there is no corroboration for the evidence furnished by PWs 1 and 2. Ext.P2 mahazar which is prepared at the spot immediately after the incident contains a detailed description of what transpired at the spot. The incident had taken place on 23.06.2001 at about 5.15 p.m. and the accused and the records were produced before court on 24.06.2001. There was hardly any time for

manipulation or fabrication of documents. The prompt action taken and also the fact that Ext.P2, the contemporaneous document leaves one in no doubt regarding the steps taken by PW1 demolishes the case of the defence that unless there is corroboration, the evidence of PWs 1 and 2 are by themselves insufficient to warrant a conviction.

16. PW5 was the then Excise Inspector of Sulthanbathery Range. He speaks about having submitted the property list and also the forwarding note along with sample seal. He is the person who laid charge before court.

17. It is seen that as is required by various decisions of this Court, the forwarding note does contain the sample of the seal. Further, the Chemical Analysis Report shows that the sample analysed contained 36.09% by volume of ethyl alcohol. The court below has analysed the evidence in considerable detail and has come to the conclusion that the evidence is sufficient to warrant a conviction. On an

independent analysis of evidence, this Court finds no ground to take a different view. None of the grounds urged in support of the accused is sustainable. The conviction is only to be confirmed.

18. Faced with the above situation, the learned counsel appearing for the appellant contended that the sentence imposed is too harsh and is disproportionate to the offence and passage of time may also have some relevance in this context. It is pointed out by the learned counsel that several changes might have taken place and it will be too harsh to confirm the sentence which was imposed by the court below. Therefore, it was prayed that some leniency be shown in this regard.

19. After having considered the submissions made by the learned counsel for the appellant, this Court too feels that sentence imposed is slightly on the higher side, considering the age of the accused, quantity seized etc., and further almost more than ten years have elapsed, as

rightly pointed out, several changes might have undergone by this time. Considering all these aspects, it is felt that some leniency can be shown in this regard.

Thus, while confirming the conviction of the accused for the offence punishable under Section 55(a) of the Abkari Act, the sentence imposed is set aside and instead he is sentenced to undergo rigorous imprisonment for a period of three months and to pay a fine of ₹ 1 lakhs, in default of payment of which, he shall suffer simple imprisonment for a period of one month. Set off as per law will be allowed.

Sd/-
P.BHAVADASAN
JUDGE

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P.A. to Judge