

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 16TH DAY OF SEPTEMBER 2015/25TH BHADRA, 1937

CRL.A.No. 942 of 2007 (E)

AGAINST THE JUDGMENT IN SC 534/2001 of ADDL.SESIONS COURT FOR
TRIAL OF ABKARI ACT CASES, NEYYATTINKARA DATED 08-08-2006

APPELLANT/ACCUSED:

VIJAYAN, S/O.PADMANABHAN,
KAITHAKANDAM, PANAYIL VEEDU, KALLUVILAKONAM,
NEMOM, THIRUVANANTHAPURAM.

BY ADVS.SRI.MANIKANTAN A.NEYYATTINKARA
SRI.GEO PAUL
SRI.SANU MATHEW
SRI.C.R.PRAMOD
SRI.M.B.SANDEEP

RESPONDENT/COMPLAINANT:

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

BY SRI. C.K. JAYAKUMAR, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
16-09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.942 OF 2007

Dated this the 16th day of September, 2015.

J U D G M E N T

The accused who was prosecuted for the offence punishable under Section 55(a) of Abkari Act, after trial was found guilty of the offence under Section 58 of Abkari Act. He was therefore convicted and sentenced to suffer rigorous imprisonment for three years 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 incident which gave rise to the case occurred on 29.06.1998 at about 2.30 p.m. It is claimed that PW4 along with his team of officers were on routine patrol duty and when they reached the Muttayattinkara junction they found the accused coming along the road with a can in his hand. He was intercepted and the can was inspected and it was found to contain 10 litres of arrack. PW4 claims to have taken sample.

He also claims to have prepared Ext.P1 mahazar and got the signature of the witnesses from the place itself. It is seen that contraband articles were seized and that labels were affixed. He returned to the Excise Range Office along with the accused and contraband articles. PW5 before whom the accused was produced took custody of the articles and prepared Ext.P3 occurrence report. The accused was sent to the court immediately. The thondi list prepared by him is marked as Ext.P5. He claims that he made a request to the court for sending the sample for chemical examination. The report received is Ext.P6. PW6 took over the investigation. He recorded the statement of witnesses, completed the investigation and laid charge before court.

3. Judicial First Class Magistrate, Neyyattinkara before whom final report was laid took cognizance of the offence and finding that the offence is exclusively triable by a Court of Session, committed the case to Sessions Court, Thiruvananthapuram. The said court made over the case to Additional Sessions Court for Trial of Abkari Cases, Neyyattinkara. The latter court, on receipt of records and on

appearance of the accused before court, framed charge for the offence punishable under Section 55(a) of Abkari Act. To the charge, accused pleaded not guilty and claimed to be tried. The prosecution therefore had PWs 1 to 7 examined and Exts.P1 to P7 marked.

4. 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. He claimed that he was at home at the relevant time when 4 to 5 excise officers came to his house and he was taken outside. A cannabis was pointed out to him and he was asked to take the same. He refused to do so. He was manhandled and thrown to the vehicle and they have taken the cannabis to the vehicle. He says that he has not committed any act as alleged.

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

6. The trial court found the evidence of PWs 5 and 6 to be convincing enough and that the evidence given by PW7 is reliable

and held that the prosecution has succeeded in establishing the case. The conviction and sentence followed.

7. Assailing the conviction and sentence, learned counsel appearing for the appellant contended that the court below had not applied its mind to the various items of evidence and had mechanically accepted the versions given by the witnesses. Learned counsel pointed out that PW4 the officer who is alleged to have detected the offence does not say about the sealing and labeling of the articles seized by him and going by his evidence, he has not taken any sample from the spot. He gets support from PW3. However, learned counsel pointed out that Ext.P7, thondi register, does not contain any description of materials except a cannas of 10 litres produced and it does not show whether there was any label on it. Learned counsel went on to point out that there is no guarantee that the articles produced before court were the articles seized from the accused. Further learned counsel pointed out that PW7, thondy clerk of the court claims to have taken sample one month after the article was produced, under orders of the learned Magistrate. Surprisingly enough, according to the learned counsel, the order authorising

PW7 to take the sample is not seen produced. PW7 also does not say about sealing, labeling etc. Therefore, there is no guarantee that sample was taken from the thondy produced before court and that there was no material to show that the article received in the chemical analysis laboratory was from the sample taken from the articles seized from the accused. These two vital aspects were omitted to be noticed by the court below and the court below presumed that all was done in proper manner. Learned counsel went on to point out that the burden is on the prosecution to show that the sample taken was from the articles seized from the accused and on failure to prove the said fact, the prosecution has to fail.

8. Referring to the evidence of PW4, learned counsel appearing for the appellant went on to point out that it is as vague as it may be. Except for saying that he has labeled the articles, there is no details given regarding the same and the worst part is that when property list is prepared, nothing stated about the labels on the article produced before court. Therefore, it is contended that the conviction cannot stand.

9. Learned Public Prosecutor, on the other hand, chose to justify the finding of the court below. It is pointed out that the evidence of PWs 3 and 4 are sufficient to show that the accused was apprehended and article was seized as alleged by the prosecution. PW4's evidence is sufficient to show that the article was seized in accordance with law and it was sealed and labeled.

10. It is significant to notice, according to the learned Public Prosecutor, that the articles were produced before court on the next day which shows that there was no delay in forwarding contraband article to the court. The evidence of PW7 is sufficient to show that sample was drawn as per law and there is no flaw in the sample as pointed out by the appellant. In short, the contention is that there are no materials to show that there is any lacuna in the prosecution and the court below has rightly found the accused guilty.

11. PWs 3 and 4 give evidence regarding detection of the incident. Among them, PW4 is the detecting officer and PW3 was accompanying him. Both of them say that while they were on patrol duty, they happened to come across the accused carrying a can with him. He was intercepted and the article was seized

and examined by PW4 and it turned out to be arrack. Evidence of PW4 shows that he had prepared the arrest memo and in the presence of witnesses he had prepared the mahazar. He speaks about having obtained the signature of the accused. He further says that can in which the contraband article was being carried was sealed and label was affixed containing the signature of the accused and the witnesses. He then claims to have returned to the Excise Range Office with the articles and the accused. Almost similar is the kind of evidence furnished by PW3 also.

12. Ext.P5 is the thondi list by which article seized was produced before court. Except for saying that a cannas having a capacity of 10 litres, nothing else is stated therein. No details about the labels, signature etc. are seen mentioned in the said document. Ext.P7 is a register of the court concerned. That too except for saying that article was received does not give any other description.

13. One may remember here that the definite case of PW4 is that he had affixed label on the cannas also containing the signature of the accused and the witnesses. No such recital is seen either in Ext.P5 or Ext.P7. True, article was produced on

the next day. But, there is nothing to show that article produced before court was the article seized. Even more strange is the evidence regarding sampling. The seized article was produced before court on 30.06.1998 and the sample appears to have been taken on 28.07.1998, almost after a month.

14. PW7 is the thondy clerk who claims to have taken sample as per the orders from the learned Magistrate of the court concerned. She says that there was a forwarding note and that she had entrusted the sample with Excise Guard. However, no order authorising her to draw sample is produced and she does not say about sealing and labeling of the sample. Result is that there is no guarantee that the sample which was received in the chemical analysis laboratory is the sample taken from the liquid alleged to have been seized from the accused.

15. It is quite disappointing to note that neither PW4 nor PW7 has understood the seriousness of the matter. They have taken the matter very lightly especially PW4, the detecting officer. Even more strange is the evidence of PW6, investigating officer. He seems to have done nothing in the matter except framing of formal charge. The court below was impressed by the

oral testimony given by PWs 3 to 7. The above aspects which have been highlighted by the appellant were not adverted to by the lower court. It cannot be said that they can be ignored. They are vital aspects in the case. The prosecution has to necessarily prove that the sample sent to the chemical analysis laboratory is the sample taken from the contraband article seized from the accused.

16. Apart from the fact that the entries in Exts.P5 and P7 are vague and general in nature, evidence regarding sampling is also ambiguous. If that be so, it will be hazardous to enter a finding of guilt against the accused.

For the above reasons, this appeal is allowed. The conviction and sentence are set aside and it is held that the prosecution has not succeeded in establishing the case against the accused beyond reasonable doubt. He stands acquitted of the offence. His bail bond shall stand cancelled and he is set at liberty.

Sd/-

P.BHAVADASAN
JUDGE

smp