

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 29TH DAY OF SEPTEMBER 2015/7TH ASWINA, 1937

CRL.A.No. 1264 of 2007 (E)

AGAINST THE JUDGMENT IN SC 271/2005 of ADDITIONAL SESSIONS
COURT (ADHOC)-II, THODUPUZHA.

APPELLANT(S)/ACCUSED NO.1:

DENSE, S/O. ANTONY,
KEEPUTATHU HOUSE, AYYAPPANCOIL KARA.

BY ADVS. SRI.M.T.SURESHKUMAR

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA
INSPECTOR OF POLICE UPPUTHARA
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. C.K. JAYAKUMAR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
29-09-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 1264 of 2007

Dated this the 29th day of September, 2015.

JUDGMENT

The appellant in this case along with two others were prosecuted for the offences punishable under Section 332 of Indian Penal Code and Sections 55(a) and 8(1) and 8(2) of the Abkari Act. The appellant alone was found guilty of the offence punishable under Section 332 of I.P.C. and Section 8 (2) of the Abkari Act. He was convicted for the said offences and sentenced to undergo rigorous imprisonment for one year and to pay fine of Rs.1,00,000/-, in default, to undergo rigorous imprisonment for three months for the offence under Section 8(2) of the Abkari Act and to undergo rigorous imprisonment for six months for the offence under Section 332 of I.P.C. The substantive sentences were directed to run concurrently and set off as per law was allowed.

2. The incident in this case is alleged to have occurred on 4.7.2002. P.W.6 was then the Sub Inspector of Police, Upputhara Police Station. In the afternoon he went on patrol duty along with other officers and when they reached near Volleyball court at Ayyappancoil, they got reliable information that a person was selling illicit liquor nearby. They went to the place and they saw the first accused standing there. Seeing police team, it is alleged that accused threw down the bottle in his hand and tried to run away from the place but was effectively prevented by the officers accompanying P.W.6. In the process, it is alleged that the accused stabbed P.W.4 with M.O.1 knife.

3. On examination of the contents of the bottle thrown down by the accused when he saw the police party, it was found to contain one litre of arrack. Search of his body yielded currency notes which according to the prosecution was obtained by sale of arrack. On questioning the accused, it was revealed that he was entrusted with the contraband article for

sale by one Pappachan and Santhamma and that the contraband article was stored in the nearby forest. From the place shown by the first accused, four cans were unearthed. Three of them had a capacity of 10 litres and one had a capacity of 20 litres. In one of the cans having the capacity of 10 litres, they found seven litres of arrack. The other three cans had only the smell of arrack. P.W.6 claims to have taken samples from the bottle alleged to have been thrown down by the accused and also from the cans. The samples were sealed and in which labels containing the signatures of the accused, P.W.6 and the witnesses were affixed. Rest of the contraband articles were also similarly sealed. Accused was arrested from the scene of occurrence itself. He claims to have prepared Ext.P1 mahazar at the spot. P.W.6 along with the officers and the accused and the contraband articles returned to the police station and registered FIR as per Ext.P4. P.W.4, who was the injured, was sent to the hospital and P.W.2 examined him and issued Ext.P2 wound certificate. P.W.6 claims to have drawn

up Ext.P5 property list and produced articles before court. The articles seized from the body of the accused were also produced. Initial forwarding note prepared was defective and it was rectified and Ext.P10 was produced before court. The chemical examination report received is Ext.P11. P.W.6 completed investigation and laid charge before court.

4. The court, before which final report was laid took cognizance of the offences. Finding that the offences are exclusively triable by a court of Sessions, the said court committed the case to Sessions Court, Thodupuzha under Section 209 Cr.P.C. The said court made over the case to Additional Sessions Court Fast Track (Adhoc) II, Thodupuzha for trial and disposal.

5. The latter court, on receipt of records and on appearance of the accused framed charge for the offences punishable under Section 332 of I.P.C. and Section 8(2) of the Abkari Act. To the charge, the accused pleaded not guilty and claimed to be tried. The prosecution therefore had P.Ws.1 to

6 examined and had Exts.P1 to P12 marked. M.Os. 1 to 4 were identified and marked. After the close of the prosecution evidence, the accused were questioned under Section 313 Cr.P.C. All the accused denied having any role in the incident and denied all the incriminating circumstances brought out in evidence against them. In addition to denying all the incriminating circumstances, the first accused claimed that he is innocent and that he was earning livelihood by collecting sand. According to him, on 4.7.2002 Devasia, a police constable attached to Upputhara police station along with two others came to the place from where he was collecting sand. He claims that he had unloaded two loads of sand for Devasia for construction of his house. He was paid only the transporting charge and the price of sand was promised to be paid after the entire sand was supplied by the first accused. When the money was not paid for a long time, first accused claimed that he went to the house of Devasia and asked for the money. That annoyed Devasia who took objection to his

conduct. He demanded that the first accused should supply another load of cement. First accused expressed his inability to do so. While things stood so, on 4.7.2002 the police officers came to the place from where he was collecting sand and he was forcibly taken to the police station and a false case was foisted on him. Finding that the accused could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. He examined D.Ws. 1 and 2 and marked Ext.D1 in his defence.

6. The trial court on an appreciation of the materials found that there was nothing to connect accused Nos. 2 and 3 to the crime and therefore acquitted them of the charges. However, relying on the evidence of P.Ws. 4 and 6 and placing faith on Ext. P1 and placing reliance on Ext. P2, the first accused was found guilty of the offences charged against him and convicted and sentenced him as already mentioned. The said conviction and sentence are assailed in this appeal.

7. Learned counsel appearing for the appellant contended that the court below has erred in clubbing I.P.C. offence along with Abkari Act offence thereby resulting in misjoinder of charges. Learned counsel highlighted the point that detection under the Abkari Act was already over and the act of stabbing is independent and separate which could not be clubbed with the abkari offences. This common charge, according to the learned counsel for the appellant has caused considerable prejudice to the accused and this vital aspect has been omitted to be noticed by the court below. That, according to the learned counsel vitiates the whole proceedings. In support of his contention, he relied on the decision reported in K.T.M.S. Mohd. v. Union of India (AIR 1992 SC 1831).

8. On the merits of the case, learned counsel went on to point out that the accused had a definite case that a Constable by name Devasia had an axe to grind against him and therefore he was falsely implicated. Presence of Devasia

in the team which is alleged to have detected the offence was admitted by the prosecution. Learned counsel also drew the attention of this Court to the fact that in fact Devasia was shown as a witness in the witness list submitted, but for reasons best known to the prosecution, he was withheld. That was deliberate, according to the learned counsel for the appellant to deny the accused of his defence.

9. Learned counsel then went on to point out that the incident is alleged to have occurred on 4.7.2002. Surprisingly enough, the article seized were seen to have been produced before court only on 3.8.2002. This unusual delay remained unexplained. According to the learned counsel for the accused, that is sufficient for an acquittal of the accused. In support of his case, he relied on the decision reported in *Ramankutty v. Excise Inspector, Chelannur Range* (2013 (3) KHC 308).

10. Learned counsel then went on to point out that the evidence of D.W.2 is clear to the effect that at any rate

there was a scuffle at the place of occurrence and the prosecution case that P.W.4 was stabbed with a knife by the accused remained unsubstantiated. Learned counsel drew the attention of this Court to Ext.P2 wound certificate. Ext.P2 came into existence after Ext.P1 mahazar has been drawn up which show that the injured was fully aware of the name of the accused and the weapon used by him. Still the injured did not either name the accused or disclose the weapon used to the doctor. According to the learned counsel, this further fortifies the defence that it was all on account of the money sought for in connection with the sand supplied to Devasia that he was charged for selling contraband article. This significant aspect has been omitted to be noticed by the court below and at any rate, the defence set up is a probable one and if that be so, the benefit of doubt should certainly go to the accused and he is entitled to an acquittal.

11. Learned Public Prosecutor on the other hand relied on the decision reported in Ramankutty v. Excise

Inspector, Chelannur Range (2011 (3) K.L.T. 353) and contended that the mere fact that contraband article seized were not produced forthwith before court by itself is not a ground to acquit the accused if sufficient and satisfactory explanation is offered by the officer concerned.

12. Learned Public Prosecutor submits that the contention based on misjoinder of charges is unfounded. Reliance was placed on Section 220(1) of Cr.P.C. and contended that the court below was justified in framing a common charge for the offences punishable under I.P.C. and Abkari Act. Further, learned Public Prosecutor relied on Section 464 of the Cr.P.C. and contended that any defect in charge including misjoinder of charge may not by itself be a ground to set aside conviction unless by doing so prejudice has been caused to the accused. No such prejudice has been caused to the accused in the case on hand and therefore the said contention is only to be rejected.

13. Learned Public Prosecutor then contended that the evidence of P.Ws. 4 and 6 are sufficient to show that the incident has occurred as alleged by the prosecution. Ext.P1 mahazar is the contemporaneous document containing all the details and that was promptly produced before court. That guarantees the detection. Ext.P2 wound certificate justifies the prosecution case that P.W.4 was injured as alleged by the prosecution. It is not necessary that the name of the assailant should be mentioned to the doctor and non-mentioning does not mean that the incident has not occurred as alleged. The injury shown in the wound certificate is one that could be caused by a sharp edged weapon as the one alleged to have been used by the accused. Learned Public Prosecutor also pointed out that P.W.6 has offered justifiable reason for the undue delay in producing the articles before court. In short, the contention is that the court below has considered all the materials in the proper perspective and there are no grounds made out to interfere with the conviction and sentence passed

by the court below.

14. As regards the first contention regarding misjoinder of charges, the stand taken by the learned Public Prosecutor seems to be fully justified. A reading of the decision relied on by the learned counsel for the appellant, namely, K.T.M.S. Mohd. v. Union of India (AIR 1992 SC 1831) show that it has no application to the facts of the case and in fact if one looks at paragraph 55 of the decision, it might be even against the accused. Section 220(1) reads as follows:

“ 220. Trial for more than one offence.– (1) If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence.”

The question is whether the act of detection of the offence under Section 8(2) of Abkari Act and stabbing of P.W.4 by the accused forms part of the same transaction. If that is so, then the common charge is justifiable. The usual tests applied to decide whether different acts are parts of the same transaction

are proximity of time, unity of place, community of purpose or design and continuity of action. It is well settled by now that it is essentially a question of fact depending upon the evidence in the case and there is no straight jacket formula to decide the issue. In the case on hand, the prosecution allegation is that on seeing the police team proceeding towards him, the accused threw down the bottle which he held and tried to escape from the place. In the process he was intercepted and while doing so he stabbed P.W.4. The act of detection of the offence under the Abkari Act and the consequent act of the accused in stabbing P.W.4 answers all the necessary ingredients which taken as a whole to constitute the same transaction as envisaged under Section 220(1) of Cr.P.C.

15. Further, if at all there is any defect in the charge, that can be overlooked by virtue of Section 464 of Cr.P.C. which reads as follows:

“464. Effect of omission to frame, or absence of, or error in, charge.– (1) No finding, sentence or order by a

Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

(2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may—(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be re-commenced from the point immediately after the framing of the charge;

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit :

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.”

Learned counsel for the appellant was unable to show that, even assuming that there is misjoinder of charge, any prejudice has been caused to the accused. The contention therefore has necessarily to fail.

16. The accused has a case that he was falsely implicated due to the reason that he asked for the price of the sand which he delivered to Devasia, one of the Constables attached to Upputhara Police Station. That Devasia was a party to the team which detected the offence is beyond dispute. The fact that Devasia was shown as a witness is also not disputed. The accused, while cross-examining P.Ws. 4 and 6 had put definite suggestions to them that the incident had not occurred as alleged by the prosecution, but in the manner as explained by him. While questioned under Section 313 Cr.P.C., he explicitly stated the manner in which the incident took place and denied that he had ever dealt with the contraband article. In spite of this definite stand taken by the accused reflected in the cross-examination of P.W.4, the prosecution was shy to examine Devasia though shown as a witness. Probably the prosecution might have felt that it would not be in their interests to examine him.

17. It is here that one has to notice the claim of injury caused by the accused. P.W.4 is the injured. That a scuffle had taken place at the place of occurrence is spoken to by P.W.4. The prosecution allegation is that the accused stabbed P.W.4 with a knife, namely, M.O.1. P.W.4 is seen to have been examined by the doctor at 7.55 p.m. on 4.7.2002 itself. One must remember that by that time Ext.P1 has been drawn up by P.W.6 the name of the accused was disclosed in Ext.P1 and P.W.4 must have been aware of the same. So also P.W.4 must have known that he has been stabbed with a knife. Surprisingly in Ext.P2 wound certificate, the cause of injury shown is a result of assault.

18. It is true that in all cases, the non-mentioning of the name of the accused or the weapon may not by itself be decisive. But it depends upon the facts of each case. In a case where police officer is injured and he knows the name of the accused and also the weapon used by the accused, it is difficult to believe that the said officer would not have

disclosed it to the doctor. This creates doubt about the prosecution version.

19. To crown it all is the undue delay in producing the contraband article before court. This Court is not forgetting the fact that Ext.P1 mahazar has been produced on the very next day of the incident.

20. In the decision reported in Ravi v. State of Kerala (2011 (3) K.L.T. 353) this Court had occasion to consider the issue of delay in producing the contraband article before court. This Court had observed that even though Section 102(3) Cr.P.C. Stipulates that the property list should be forwarded to the court forthwith, the said provision does not say that the property should be produced before court forthwith. But in case there is delay, proper explanation should be offered for the delay. What is significant is that the Division Bench of this Court was cautious enough to observe that undue delay cannot be simply overlooked and it should be properly explained.

21. In the decision relied on by the learned counsel for the appellant reported in *Ramankutty v. Excise Inspector, Chelannur Range* (2013(3) KHC 308) this Court went to the extent of holding that even a day's delay may be fatal. However, a reading of the decision shows that the decision did not proceed on the basis of delay alone, but on various other infirmities also. However, one cannot overlook the fact that the contraband article should be produced before court as soon as possible and if there is any delay, proper explanation has to be offered.

22. In the case on hand P.W.6 says that he was too busy to produce the article before court. Obviously that cannot be a reason for the delay. To recollect the facts, the contraband articles were produced only on 13.8.2002, almost a month and more after the date of detection. This unexplained delay cannot be overlooked. What made the police officer to keep the article in his custody is not known. Even assuming that the decision reported in *Ravi v. State of*

Kerala (2011(3) K.L.T. 353) applies to the facts of this case, still, the reason for the undue delay has to be explained. One may pardon the police officer who has not produced the articles forthwith. But lapse of one and a half month is too long delay which remained unexplained.

23. These vital aspects have been omitted to be noticed by the trial court.

24. It is no doubt true that P.Ws. 4 and 6 gave a uniform version of the incident which is also supported by the contents of Ext.P1. But in the case on hand the accused had put forward a definite defence which he has suggested to P.Ws. 4 and 6 and also has highlighted in his statement under Section 313 Cr.P.C. The consequence of non-examination of Devasia who is claimed to be the villan by the accused has already been referred to.

25. Considering the totality of the circumstances, it would appear that the case put forward by the accused is a probable one. If that be so, the benefit of doubt should

certainly go to the accused. For the above reason, this Court feels that the prosecution has failed to establish that the accused is guilty of the charges levelled against him and he is entitled to acquittal.

Hence, the conviction and sentence passed by the court below are set aside and the accused stands acquitted of the charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

P. BHAVADASAN,
JUDGE

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