

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 17TH DAY OF SEPTEMBER 2015/26TH BHADRA, 1937

CRL.A.No. 1303 of 2007 ()

**AGAINST THE JUDGMENT IN SC 204/2006 of ADDITIONAL SESSIONS COURT
(ADHOC) - I, MANJERI, DATED 06-07-2007**

**AGAINST THE ORDER IN CP 66/2005 of JUDICIAL FIRST CLASS MAGISTRATE
MALAPPURAM**

APPELLANT(S)/ACCUSED:

**NARAYANAN, S/O.MAMMOOTTY, NALLATT HOUSE,
AMAPARA, KOTTAKKAL.**

BY ADV. SRI.SOJAN MICHEAL

RESPONDENT(S)/COMPLAINANT:

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

BY PUBLIC PROSECUTOR SMT. S. HYMA

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 17-09-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 1303 of 2007

Dated this the 17th day of September, 2015

J U D G M E N T

The accused was prosecuted for the offence punishable under Section 55(i) of the Abkari Act for having been in possession of contraband articles and accusing him of sale of the same.

2. The incident is said to have occurred on 15.02.2005. On that day, PW1, the Circle Inspector of Police, Tirur had gone on patrol duty along with other officers. When they reached Kottakkal, an information was passed on to them that a person by name Narayanan in his shop at Amappara was engaged in the sale of Indian Made Foreign Liquor. He decided to conduct a search of the shop room. Ext.P1 search memo is alleged to have been prepared by him. He along with his team of officers reached the place and he found the shop in respect of which he received information situated on the eastern side of the road and that

was a vegetable shop. When they reached the shop, the accused was present there. The shop was searched. Inside the shop, on the northern side near the wall, they were able to detect the contraband articles made mention of in his deposition. They also found a glass along with other articles. Below the table there was a wooden box which too contained contraband articles and they were seized. By smell and taste, he became convinced that they were Indian Made Foreign Liquor. Informing the accused that he was committed an offence, he was arrested, according to PW1, as per Ext.P2 arrest memo. He then says that all the bottles were covered with a cloth and tied with thread and seal was affixed on them. The seal of SHO was alleged to have been affixed on the articles seized. He then says that on all those material objects, labels containing the signature of the accused, himself and the witnesses were affixed. He also says that he recovered two empty bottles near the wooden box. He seized them also and then on those bottles, he

claims to have affixed labels containing the signature of the accused, himself and the witnesses. Similar act was done with respect to the glass seized by him. PW1 then says that samples were taken from the bottles. He prepared Ext.P3 search list in which he and witnesses have signed. He then returned to Kottakkal Police Station and registered Crime No. 57/2005 for offences punishable under Section 55(a) and 55(i) of the Abkari Act as per Ext.P5 FIR. According to him, he had kept the seized articles in his personal custody and he had the key of the property room of the station. Ext.P6 is the property list alleged to have been prepared by him. He says that articles were produced before court. PW7 took over investigation. He prepared Ext.P9 scene mahazar. He recorded the statement of witnesses. He prepared Ext.P13 forwarding note. According to him, while he conducted investigation, he realized that the building number shown by PW1 is wrong and the correct number is 9/315. He therefore filed a report to that effect which is marked as

Ext.P14. He had the sketch of the site prepared by the Village Officer. Ext.P7 is the Chemical analysis report. He completed investigation and laid charge before court.

3. The Judicial First Class Magistrate Court, Malappuram before whom the final report was laid, took cognizance of the offence. Finding that the offence is exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Manjeri under Section 209 Cr.P.C. after following the necessary procedures. The Sessions Court, on receipt of record made over the case to Additional Sessions Court, Manjeri for trial and disposal.

4. The latter court on receipt of records and appearance of the accused framed charges for the offences punishable under Sections 55 (a) and 55(i) of the Abkari Act. To the offence the accused pleaded not guilty and claimed to be tried. The prosecution therefore had PWs 1 to 7 examined and Exts. P1 to P14 marked. MOs 1 to 7 were got identified and marked.

5. After the close of prosecution evidence, the accused was questioned under Section 313 of Cr.P.C.. He denied all the incriminating circumstances brought out in evidence against him and maintained that he was falsely implicated by the Police. Finding that he could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. The accused chose to adduce no evidence.

6. Presumably impressed by the evidence of PWs 1 and 4, i.e., the detecting Officer and the officer who had accompanied him and the contemporaneous document, the court below found that the case against the accused has been established by the prosecution and therefore, the conviction and sentence as already mentioned followed.

7. The said conviction and sentence are assailed in this appeal.

8. The learned counsel appearing for the appellant pointed out that keeping aside all other infirmities, the most important aspect for the prosecution is to prove the

possession and ownership of the place from where the article was seized. No certificate is obtained from the local authority to show that the accused is either in possession of the premises or he is the owner of the premises. There is no case for the prosecution that he had taken the premises on rent and therefore he was in possession. To crown it all, the learned counsel pointed out that going by the evidence of PW1, the number of the shop room from where the articles were seized was 10/258. However, PW7, the Investigating Officer found the number to be 9/315. As to how he came to that conclusion is not discernible from the evidence. Then again, according to the learned counsel, PW7 is admittedly the SHO of the station. PW1 says that on all articles seized by him, he affixed the seal of SHO. Further, the learned counsel drew attention of this Court to the claim made by PW1 that all the articles were kept by him under his custody and he had the key of the property room of the Police Station concerned. Drawing attention to the evidence of

PW7, the learned counsel pointed out that the property room has two keys; one of which is always kept by the SHO and other by the writer of the station. He is definite that during the period from 15.02.2005 to 28.02.2005 he had not handed over the key of the property room to anybody. He also deposed that almost everyday with regard to cases detected, properties will be brought to the station and they had to be kept in the property room. It is also significant to notice from the evidence of PW1 that he categorically denies having gone to building No. 9/315. Further, one has to notice, according to the learned counsel, that Ext.P3, which is the search list and which is supposed to contain all the essential details, does not contain the material aspects spoken to by PW1. That is also admitted by PW1. Drawing attention to the evidence of PW4, the learned counsel pointed out that PW4, who is alleged to have been accompanying PW1 has also a case that the seizure mahazar was prepared. PW1 has no such case.

9. The absence of many of the details spoken to by PW1 in Ext.P3, which is the contemporaneous document creates considerable doubt regarding the prosecution allegation. The learned counsel also drew attention of this Court to yet another aspect. Drawing attention to the statement made by PW1, the learned counsel pointed out that PW1 has no case that he had ever seized a bottle containing Brawo Grape Brandy of 375 ml. He was confronted with Ext.P7, the Chemical Analysis Report in which item No. 3 is shown as 375 ml Brawo grape Brandy. This glaring anomaly further weakens the case of the prosecution. These significant aspects have been conveniently omitted to be noticed by the lower court and the lower court has mechanically acted on the evidence of PWs 1 and 4 to find the accused guilty. The learned counsel contended that by no stretch of imagination, the conviction and sentence cannot be sustained.

10. The learned Public Prosecutor made a very valiant attempt to support the finding of the court below. But the learned Public Prosecutor had no answer for many of the queries put by this Court. To a query put by this Court as to what is the authentic document to show that the accused was either the owner or the man in possession of the shop room, the Public Prosecutor has no answer. Except the statement made by PW1 that, when he visited the shop, the accused was there. The learned Public Prosecutor then pointed out that there is no allegation that the Police officer had any oblique motive or they had any reason to falsely implicate the accused and the evidence of PWs 1 and 4 are sufficient to show that the prosecution case is true. At any rate, the learned Public Prosecutor pointed out that the trial court chose to accept the evidence of PWs 1 and 4 and there is no reason as to why this Court should disbelieve them. It is therefore contended that his conviction and sentence may not be interfered with.

11. As usual, here too, the independent witnesses have turned hostile and the prosecution derives no support from their evidence. Even assuming it to be so, it is not the law that as soon as the independent witnesses turn hostile and refuse to support the prosecution, the accused is entitled to an acquittal. If as a matter of fact, the evidence of the Police Officers is found to be trustworthy, credit worthy and contains a ring of truth, there is no reason as to why the court should not accept their evidence and enter a finding on that basis. Of course, normally the court insists that their evidence should be without blemish. Usually, the court takes aid of the contemporaneous documents alleged to have been prepared by the Police Officers to ensure that statements given by them is supported by documents.

12. Bearing the above aspects in mind, an attempt shall now be made to ascertain whether the evidence of PWs 1, 4 and 7 can sustain the prosecution case. PW1 is the detecting officer. He was the Circle Inspector of Tirur Police

Station as on the date of incident. His version is that while he was on patrol duty, he received reliable information about the nefarious activity being carried on by the accused. He went to the spot and speaks about having seized various articles made mention of by him and also reflected in the search list namely Ext.P3. He gets sufficient support from PW4 in this regard. PW4 claims to have accompanied PW1 in the patrol duty. However, PW4 is definite that a seizure mahazar was prepared, while PW1 stoutly denies having done so. Assuming it may not be of much significance, what is shocking is that PW1 deposes to the effect that most of the acts which he claims to have done at the spot does not find a place in Ext.P3. The result is that Ext.P3 cannot be said to be a contemporaneous reliable document of what PW1 had done at the spot. Normally, when the search list or the seizure mahazar as the case may be, is prepared at the spot, it gives a detailed narration of what had transpired at the place and what was done by the detecting officer also.

PW1 in no less terms admits that none of the acts that he claims he had done at the spot finds a place in Ext.P3. That creates considerable doubt regarding the detection. PW1 is definite that from the date of detection till the articles were produced in court, it was under his custody and he had the key of the property room of Tirur Police Station. PW7, the SHO of the Police Station is equally categorical that he had the key and he had not given the key to anybody and the duplicate of the key was with the writer. So there is considerable doubt also regarding the person who was in actual custody of the articles. There are glaring inconsistencies and contradictions between the evidence of PWs 1 and 7 in this regard. PW7 is categorical in his statement that almost everyday, the property room has to be opened to keep articles seized during investigation of various cases. If the key was with the CI of Police, it escapes one understanding how PW7 could have opened the property room and PW1 has no case that he had taken the

key from the writer.

13. To crown it all, Ext.P7 is the Chemical Analysis Report. Ext.P7 says that among the articles sent for chemical analysis contained a bottle of 375 ml Brawo Grape Brandy. PW1 in his cross examination has stated that he had never seen any such article. In this regard, at least he get support from PW7 also. The result is that there is doubt regarding articles actually sent for chemical examination.

14. To make things worse of the prosecution, they made no attempt to ascertain the ownership or possession of the place from where the articles were seized. Apart from the anomaly in the number spoken to by PWs 1 and 7, PW7 the Investigating Officer did not even attempt to get any authentic document from the local authority to show that the building was either owned or possessed by the accused, which is a basic requirement in such type of cases. Even assuming that the accused was present at that place, it does not mean that he was engaged in sale. Unless it is shown

that he was the owner or the man in possession and therefore was aware of the presence of the contraband articles in the premises. It is baffling as to how these aspects escaped from the notice of the lower court. The allegation appears to be that the accused was in possession of the articles for sale. If he is to be in possession of the contraband article, he is to be in possession of the premises also. The evidence in that regard is absolutely essential. That is absent.

15. The above glaring infirmities in the evidence of prosecution cannot be easily overlooked. True, if the evidence of the Police Officer is above board, conviction can be certainly based on the same. But in the case on hand, as noticed above, the various aspects which have come out in evidence create a reasonable suspicion regarding the case put forward by the prosecution. If that be so, the benefit of doubt should certainly go to the accused.

For the above reasons, this appeal is allowed. Conviction and sentence passed by the court below are set aside and it is held that the prosecution has not been able to prove the case beyond reasonable doubt against the accused. He stands acquitted of the offences 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