

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

THURSDAY, THE 30TH DAY OF JULY 2015/8TH SRAVANA, 1937

CRL.A.No. 1647 of 2005 ()

(AGAINST THE CONVICTION AND SENTENCE IN S.C.NO.1236/2003 ON THE
FILE OF ADDITIONAL SESSIONS JUDGE, FAST TRACK - III, THIRUVANANTHAPURAM

APPELLANT(S)/1ST ACCUSED:

KARUNAKARAN, S/O.KRISHNA PILLAI,
KONIYOTTU PUTHEN VEEDU, PANGAPPARA,
THIRUVANANTHAPURAM TALUK.

BY ADV. SRI.G.SUDHEER

RESPONDENT(S)/COMPLAINANT:

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

R1 BY ADV. PUBLIC PROSECUTOR SMT.P.MAYA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 30-07-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SUNIL THOMAS, J.

Crl.Appeal. No. 1647 of 2005

Dated this the 30th day of July, 2015

JUDGMENT

Sunil Thomas, J.

The first accused, who stands convicted for offence punishable under Section 55(a) of the Abkari Act in S.C.No.1236/2003 of the Additional Sessions Judge, Fast Track-III, Thiruvananthapuram, is the appellant herein.

2. The allegation of the prosecution is that on 20/6/2000 at about 7 p.m. while the Excise Circle Inspector attached to the Excise Enforcement and Narcotic Special Squad Thiruvananthapuram, and his party were on a regular patrol duty, they came across the first accused, who was proceeding along the Panchayat road carrying a jerry can. On getting suspicious, he was intercepted, searched and it was revealed that the jerry can contained about five liters of arrack. He was arrested on the spot. He revealed that arrack was supplied to him by the second accused. Crime was laid against both the accused. After completing of the investigation, final

charge was laid before the Sessions Court, which framed charge under Section 55(a) of the Abkari Act. The accused denied the charge and pleaded not guilty.

3. Before the court below, prosecution adduced oral testimony of PW1 to PW6. Exts.P1 to P5 and MO1 was marked. On completion of the prosecution evidence and after questioning the accused under Section 313 Cr.P.C., the accused was called upon to enter on his defence. He produced DW1 on his side and was examined.

4. The court below, on an evaluation of the available materials, found the accused guilty, convicted and sentenced to undergo imprisonment for three months and to pay a fine of Rs. 1,00,000/- and in default, to undergo simple imprisonment for one month. The second accused was acquitted.

5. The above conviction and sentence is under challenge in this appeal. Heard and examined the records.

6. The prosecution allegation was that the accused was intercepted on 20/6/2000. The prosecution is relying on essentially on the oral testimony of PW3 and PW4 along with contemporaneous documents, to bring home the guilt of the

accused. The alleged search and seizure was witnessed by PW1 and PW2, two independent witnesses, according to the prosecution. However, both the above witnesses turned hostile and did not support the prosecution case, in any manner. In fact, they, to a certain extent, supported the accused. The defence, as revealed from the trend of cross examination and the reply given by the accused in answer to Section 313 Cr.P.C. questioning is that he was a hotel employee and on the relevant day, while he was returning after work, he was stopped by the excise party by holding him by his collar. They enquired about the persons who were selling arrack in the locality. When he pleaded ignorance, he was taken to the jeep and was later produced before the court. According to him, he was not involved in any dealing of arrack. Even according to the version of PW1 and PW2, they were present at the spot and they also saw that the accused was intercepted. However, relevant part of allegation to the extent of seizure of MO1 was denied by them. It is also on record that the second accused was apprehended on the basis of the alleged information conveyed by the first accused.

7. According to the prosecution, Exts.P1 and P2 are the contemporaneous documents prepared at the spot. Ext.P1 is a scene mahazar and Ext.P2 is the arrest memo. Scene of occurrence, according to the prosecution, is a part of the panchayat road. A reference to Ext.P1 scene mahazar shows that the process of interception, search and other connected details are elaborately dealt with on both sides of a single sheet paper. The whole space of the paper is seen utilised for detailed narration of the sequence of events. It is seen that virtually, no space is left out and even there is compression of writing towards the end. The above document is seen signed by twelve persons which includes ten from patrol party and the remaining two are PW1 and PW2. They have signed in the gaps wherever possible. According to PW3, Ext.P1 was prepared at the spot itself. It is relevant to note that the time of interception, even according to the prosecution, was 7 p.m. The mahzar specifically states that when they saw the accused, he tried to escape and he was followed with the help of torch light and was caught. Evidently, at the place of search there was no sufficient light. There is absolutely no evidence as to how Ext.P1 was prepared

in the darkness. This assumes significance since according to PW3, there was no house, nearby. In the absence of any specific evidence as to how, Ext.P1 was prepared, accused was intercepted and the detailed process of preparation of Ext.P1 Mahazar with twelve person signing the prosecution case is highly doubtful especially in the background of the version of the prosecution that the accused was intercepted with the help of torchlight.

8. Ext.P1, and the oral testimony of PW3, gives an impression that accused was intercepted, while they were doing the actual patrol duty. PW3 specifically stated that they saw the accused while they were on patrol duty. Evidence is there to show that they were travelling in a jeep. There is absolutely no reference in the version of PW1 and PW3 that they were on foot at the time of interception of the accused. However, PW6 the investigating officer in his testimony has stated that at the time of inspection, jeep was parked at a distance, and the excise party were on their foot. The reply given by the accused under Section 313 Cr.P.C. questioning is that the excise party were on jeep when they intercepted him. Evidently, there is minor

variation in the version as to the actual process of interception.

9. It is pertinent to note that Ext.P1 specifically states that after inspection, can was opened, some portion taken out, smelled and tasted to confirm the contents. According to the prosecution, they were satisfied that it was arrack and thereafter labels were affixed on MOI. The can was marked as MO1, in the course of examination. In other words, the prosecution case is that there was no sampling at the time of interception and seizure. However, Ext.P5 chemical analysis report shows that a 150ml. sealed bottle was received by the chemical analysis lab. It is clear that only a sample was sent for chemical analysis. Ext.P4 property list shows that orders were taken from the concerned court for sampling. However, prosecution did not tender any evidence as to who sampled it, how it was sampled, when it was sampled and the process as to how samples were taken from the jerry can. Evidently, there is total lack of evidence regarding the process of sampling to ensure that sample sent for chemical analysis was taken from the very same can which was allegedly taken from the custody of the first accused. The crucial link is missing. There is absolute

lack of transparency regarding the process of sampling.

10. Ext.P1 does not contain the details of the seal, which was allegedly affixed on the MO1, even though in Ext.P1 there is a reference regarding sealing. PW3 has mentioned that he had affixed the seal of the Special Squad office. PW4 in his version has stated that the seal that was affixed was the official seal. On the other hand, PW6, the investigating officer, disclosed that the version that was conveyed to him was that the personal seal of the investigating officer was affixed. On the other hand, mahazar does not bear the impression of the seal, which could have confirmed that the seal was affixed on MO1 at the spot itself. There is divergent version regarding the actual seal that was allegedly affixed.

11. It is also pertinent to note that though interception and arrest took place on 20/6/2000, the investigation was taken over on 1-2-2002 only. There was a delay of more than one and half years. There is absolutely no record as to why there was such a long delay. Even though there is nothing to show that prejudice was caused to the accused due to the above delay, considerable delay is not explained. The possibility of witnesses

having not spoken the correct details, after long gap of one and half years is likely to prejudice the accused, since the version spoken by the witnesses were only from their faded memory.

12. An appreciation of the entire facts show that the evidence tendered by the prosecution is shaky and doubtful. Since the prosecution has failed to prove the case beyond the shadow of doubt, the conviction cannot be sustained. Accused is entitled to the benefit of doubt.

In the result, the appeal is allowed. The conviction and sentence imposed by the court below is set aside. The accused is acquitted. The bail bond executed by him stands discharged.

Sd/-

SUNIL THOMAS
Judge

dpk

/true copy/ PS to Judge.

