

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 25TH DAY OF NOVEMBER 2015/4TH AGRAHAYANA,
1937

CRL.A.No. 6 of 2006 ()

AGAINST THE JUDGMENT IN SC 443/2003 of ADDL.SESIONS COURT
(ADHOC)-II, THODUPUZZHA.

APPELLANT(S)/ACCUSED 1 AND 2:

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1. LALITHA, W/O. THANKACHAN,
PERUMBRAL HOUSE, AYYAPPANCOIL VILLAGE,
MEPPARA KARA.
 2. THANKACHAN, S/O. VARGHESE,
PERUMBRAL HOUSE, AYYAPPANCOIL VILLAGE,
MEPPARA KARA.

BY ADV. SRI.ROJO J.THURUTHIPARA

RESPONDENT(S)/COMPLAINANT:

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

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
25-11-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 6 of 2006

Dated this the 25th day of November, 2015.

JUDGMENT

A couple was prosecuted for the offence punishable under Sections 55(a) and (i) of the Abkari Act. They were found guilty and they were therefore convicted and sentenced to suffer rigorous imprisonment for one year each and to pay fine of Rs.1,00,000/-, in default, to undergo rigorous imprisonment for three months each.

2. The incident which gave rise to this case occurred on 19.4.2001. P.W.2 was the Sub Inspector of Kattappana Police Station at the relevant time. On the date of the incident, at about 5.30 a.m., he received reliable information that in the house of Thankachan at Perumbra, vending of illicit liquor is going on and considerable quantity is kept for sale. After preparing the search memo, police party proceeded to the place of occurrence along with the witnesses. In the house, there was another person apart from the couple.

In the room adjacent to the kitchen, on a table a jug having capacity of 750 ml with arrack and one glass having the smell of liquor were found. Further, from the compound, one bottle having the capacity of 750 ml with full of liquid and a green bottle having the capacity of 1 ½ litres with 700 ml liquid were seized. In another portion of the compound, a can having the capacity of 10 litre containing 6 litres of arrack was also seized. P.W.2 then arrested the first accused. He prepared samples of various articles seized and prepared the necessary mahazar. He speaks about having affixed seal and label on the samples which contained the signature of the accused, witnesses and P.W.2. Later he returned to the station along with the accused, the seized articles and the documents and registered crime as per Ext.P5(a) FIR. Ext.P6 is the property list prepared by him. He says that from the date of detection till production, the articles were in his custody.

3. Further investigation was done by P.W.3. He recorded statements of witnesses and produced the first accused before court. He obtained a certificate from the Panchayat Secretary regarding the ownership and possession of the place from where the articles were seized. He 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. The said court made over the case to Additional Sessions Court (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 offence punishable under Section 55(i) 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 3 examined and had

Exts.P1 to P11 marked. M.Os. 1 to 5 were identified and marked. After the close of the prosecution evidence, the accused were questioned under Section 313 Cr.P.C. They denied all the incriminating circumstances brought out in evidence against them and maintained that they were innocent. Finding that the accused could not be acquitted under Section 232 Cr.P.C., they were asked to enter on their defence. They chose to adduce no evidence.

6. Accepting the evidence of P.Ws.1 and 2 and also holding that the contemporaneous document supports the version given by P.Ws.1 and 2 and also the fact that the property, the articles and the accused were produced before court promptly, found the accused guilty. Conviction and sentence as already mentioned followed.

7. Assailing the conviction and sentence, learned counsel appearing for the appellants pointed out that the charge was one under Section 55(i) of the Abkari Act, which

involves sale of the commodity. There is absolutely no evidence at all of any sale having been done by the accused in this case. So, by no stretch of imagination, the conviction cannot be sustained under that provision. Learned counsel also pointed out that referring to the evidence of P.W.2, he had taken only one sample even though several bottles and cans were seized. It was also contended that during cross examination, P.W.3 stated that he could not say from which bottle he had taken the sample. Therefore, there is no evidence to show that the accused had actually possessed arrack. Learned counsel contended that 'arrack' as per the definition contained in Section 3(6A) of the Abkari Act says that arrack means any potable liquor other than toddy etc. There is no evidence to show that the article seized and analysed is potable liquor so that there is no evidence to show that the accused was in possession of arrack. On these grounds, it is contended that conviction cannot stand.

8. Learned Public Prosecutor tried to support the finding on the basis of the evidence of P.Ws. 2 and 3 and the contemporaneous document. Learned Public Prosecutor pointed out that at any rate, the court below has found that the evidence is sufficient to warrant a conviction, and there is no ground to interfere with the same.

9. After having heard learned counsel for the appellants and the learned Public Prosecutor, and after having perused the records, it is difficult to accept the contention raised by the learned Public Prosecutor. P.W.2 is the detecting officer. He conducted a major portion of the investigation also. In cross-examination, he is unable to say from which bottle he had taken the sample thereby creating ambiguity regarding the sample which was sent for analysis. There were several bottles recovered from various places from the premises and P.W.2 only says that he is not able to say specifically from which bottle the sample was taken and that

explodes the prosecution case.

10. Further, the definition of arrack as now contained in the Abkari Act is arrack means potable liquor. As rightly pointed out by the learned counsel for the appellants, there is no finding in the chemical analysis report, namely, Ext.P8, that the commodity analysed is potable liquor to qualify as arrack. This also adds to the agony of the prosecution. To crown it all is the fact that charge under Section 55(i) of the Abkari Act. There is absolutely no evidence to the effect that the couple now being prosecuted were engaged in the sale of arrack or there is any material to show that they had sold the contraband article to anybody. In the absence of such an evidence, the offence cannot be attracted.

For the above reasons, this appeal is allowed, the conviction and sentence passed by the trial court are set aside and it is held that the prosecution has not succeeded in

proving the guilt of the accused beyond reasonable doubt. The accused are acquitted of the charges levelled against them. Their bail bonds shall stand cancelled and they are set at liberty.

P. BHAVADASAN,
JUDGE

sb.