

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 7TH DAY OF SEPTEMBER 2015/16TH BHADRA, 1937

CRL.A.No.30 of 2006 (C)

AGAINST THE JUDGMENT IN SC 149/2003 of ADDL. DISTRICT & SESSIONS
COURT (ADHOC) FAST TRACK-III, PATHANAMTHITTA DATED 26-12-2005

APPELLANT/ACCUSED:

GOPI, S/O.AYYAPPAN,
PALAVILA, THEKKATHIL VEEDU, VAYALAKARA,
ERATHU VILLAGE, ADOOR.

BY ADV. SRI.SAJJU.S

RESPONDENT:

STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HGIH COURT OF KERALA, ERNAKULAM.

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

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
07-09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.30 OF 2006

Dated this the 7th day of September, 2015.

J U D G M E N T

The accused in this case was prosecuted for the offences punishable under Sections 55(a) and 8(1) and (2) of Kerala Abkari Act. He was found guilty of offences punishable under Sections 8(1) and (2) of Abkari Act and convicted and sentenced to undergo simple imprisonment for two years and to pay a fine of Rs.1,00,000/- with default clause of simple imprisonment for three months.

2. The prosecution case is that on 19.06.1999, while PW1, Preventive Officer, was on patrol duty along with other officers, he happened to see the accused going along the road carrying a can. He was intercepted and the can was examined. The liquid in the can, on examination, was found to be arrack. These were done in the presence of two witnesses who come along that way. After preparing Ext.P1 arrest memo, accused was arrested. Samples from the can were taken and signature of the accused,

officer concerned and the witnesses were obtained over the labels affixed on the same. PW1 prepared Ext.P2 mahazar in the spot itself. The accused, along with the articles seized was produced before PW4 who registered a crime as Crime No.40/1999. Ext.P5 is the crime and occurrence report prepared by him. He prepared Ext.P6 property list and produced the accused along with the articles before court. He filed requisition before court for sending the sample for chemical examination and obtained Ext.P7 report. He produced the accused before court and got him remanded. Subsequent investigation was done by PW5. He, recorded the statement of witnesses, completed investigation and laid charge before court.

3. The Judicial First Class Magistrate Court, Adoor before whom final report was filed took cognizance of the offences. Finding that the offences are exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Pathanamthitta. The said court made over the case to Additional District & Sessions Court (Adhoc) Fast Track-III, Pathanamthitta for trial and disposal. That court, after hearing the prosecution

and also after perusing the records, framed charge against the accused under Sections 8(1) and (2) of Abkari Act. The charge was read over to the accused. To the charge, accused pleaded not guilty. The prosecution therefore examined PWs 1 to 5 and had marked Exts.P1 to P8. M.O.1 was also 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. Finding that he could not be acquitted under Section 232 Cr.P.C, he was asked to enter on his defence. He examined DW1 from his side.

5. The trial court, on appreciation of the evidence, found that the prosecution has proved its case and therefore convicted and sentenced the accused as already mentioned. The conviction and sentence are assailed in this appeal.

6. Learned counsel appearing for the appellant contended that there is want of evidence to show that the sample sent for chemical examination is the one which was taken as sample from the place of occurrence. It is pointed out that the evidence of

PW1 is to the effect that the sample collected was clear pure liquid. However, chemical examination report, Ext.P7, shows that the sample forwarded for chemical examination contained sediments. This causes suspicion about the article sent for chemical examination and that is sufficient to show that the prosecution has failed to prove its case.

7. In the case on hand, PW1 is the Preventive Officer. He speaks about the incident. He says that while he was on patrol duty along with other officers, he happened to come across the accused holding a can having a capacity of 2 litres. The accused was intercepted in the presence of two witnesses who came along the way. They conducted examination of the articles and were satisfied that the liquid contained in the can was arrack. After preparing the arrest memo Ext.P1, Ext.P2 mahazar was also prepared. M.O.1 is the can seized by him. PWs 2 and 3 are the witnesses in whose presence the seizure is alleged to have been made. Though they denied that they had actually seen the incident, they admitted that they signed in the document from the place where the seizure was taken place.

8. PW4 is one of the investigating officers. It is deposed by him that on the date of the incident itself, the articles were produced before him and he registered a crime as Crime No.40/1999 as per Ext.P5 occurrence report. He prepared the property list and forwarded it to the court. He obtained chemical examination report, Ext.P7. He also says that the report shows that the sample contained 22.90% by volume of ethyl alcohol.

9. The only contention taken is that in the light of Ext.P7 chemical examination report which shows that the articles received for examination contained sediments and since it is not in tune with what is deposed by PW1, the articles sent for chemical examination by PW4 cannot be the articles which were seized. To say the least, the argument is imaginative. But there is no explanation attempted to be obtained from PW4 regarding this aspect. There is also no suggestion to PW4 who claims to have sent the articles for chemical examination that the articles which was actually seized is not the one which was sent for chemical examination. In the absence of any substantive

materials to prove the same, it cannot be presumed that the articles sent for chemical examination is not the one which was collected from the accused.

10. PW5 is the Excise Inspector who laid charge before court. Even though PW4 was asked regarding various omissions, that was not put to PW5. So those omissions cannot be said to be fatal. In the light of the fact that the articles seized contained ethyl alcohol to the tune of 22.90%, offence is clearly made out. The conviction was rightly entered into under Sections 8(1) and (2) of Abkari Act.

11. The next question that arises for consideration is regarding sentence. The court below has imposed a sentence of two years simple imprisonment and a fine of Rs.1,00,000/- with default clause of simple imprisonment for three months. There is nothing to show that the accused has been involved in any other similar incident. It is felt that the sentence imposed is very harsh and is disproportionate to the quantity of liquor possessed. Therefore, interference in the matter of sentence is felt absolutely necessary.

In the result, while confirming the conviction under Sections 8(1) and (2) of Abkari Act, the sentence imposed is set aside and the accused is sentenced to undergo simple imprisonment for six months and to pay a fine of Rs.1 lakh, in default of payment of which to suffer simple imprisonment for three months.

Sd/-

**P.BHAVADASAN
JUDGE**

smp

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P.A to Judge.