

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 20TH DAY OF NOVEMBER 2015/29TH KARTHIKA, 1937

CRL.A.No. 31 of 2006 (C)

**AGAINST THE JUDGMENT IN SC 254/2005 OF ADDITIONAL SESSIONS COURT (NDPS
ACT CASES), THODUPUZZHA**

APPELLANT(S)/ACCUSED::

**YOHANNAN, S/O. PAILI,
THANKAPPALLIYIL HOUSE, NARAKAKANAM KARA
THANKAMANI VILLAGE.**

**BY ADVS.SRI.PAUL MATHEW (PERUMPILLIL)
SRI.M.DINESH
SRI.JOBY JACOB PULICKEKUDY
SRI.ANIL GEORGE**

RESPONDENT(S)/RESPONDENT::

**STATE OF KERALA,
REP. BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA
ERNAKULAM.**

BY PUBLIC PROSECUTOR SMT. S. HYMA

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 20-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 31 of 2006

Dated this the 20th day of November, 2015

J U D G M E N T

The accused was prosecuted for the offence punishable under Sections 55(g) and 8(1) & (2) of the Kerala Abkari Act. He was found guilty. He was therefore convicted and sentenced to suffer simple imprisonment for two years and to pay a fine of ₹1 lakh with a default clause of simple imprisonment for a further period of one year. No separate sentence was imposed for the offence under Section 55(g).

2. The incident which gave rise to this case occurred on 31.08.2002. PW1 was then functioning as the Preventive Officer at Kattappana Excise Range. On the date of incident, at about 6.00 a.m., he received reliable information from the forest officials that the accused is carrying on illicit distilling and keeping arrack in his house. He proceeded with the other officers after preparing the search memo and sending

it to the court to the place of occurrence. When he reached the house, he found in the almirah of the kitchen a bottle having a capacity of 1 ½ litres containing some liquid. He, by taste and smell, recognized it as arrack. In the 1½ litre bottle, it contained 1 litre of arrack. In the bedroom of the house from beneath the cot, two plastic pots and a black can were seized. The can contained full of a yellow coloured liquid. The pot also contained the same thing. By smell and taste, he realized that those liquids were wash. They also were able to see from the place where fire wood was stored two aluminium utensils; one having 35 litres capacity and other having 10 litre capacity. From the wash so seized, a sample of 500 ml in a bottle having a capacity of 750ml was taken. Rest of the wash was destroyed at the place itself. From the bottle containing the arrack, 200ml of sample in a bottle having a capacity of 375ml was taken. The three samples taken were sealed and labelled as is required under law. So also the balance contraband article. PW1 prepared

Ext.P1 mahazar at the place itself and Ext.P2 search memo was prepared. He was arrested as per Ext.P3 arrest memo. The samples were marked as MO1 and MO2. PW5, who was the Preventive Officer attached to the Station, received articles and the accused produced by PW1 and registered crime as per Ext.P6 occurrence report. He prepared the forwarding note namely, Ext.P7 and the property list prepared by him is Ext.P8. Search list was marked as Ext.P9. Further investigation was conducted by PW7. He recorded statements of witnesses, obtained the Chemical Analysis Report namely, Ext.P11. He also obtained Ext.P10 certificate showing the ownership of the house in question. After completing investigation, he laid charge before court.

3. The court before which the final report was laid, took cognizance of the offence and finding the offences to be exclusively triable by a Court of Sessions, committed the case to Sessions Court, Thodupuzha under Section 209 of Cr.P.C. after following the necessary procedures. The said

court made over the case to Additional Sessions Court (Special Court for NDPS Act cases), Thodupuzha for trial and disposal.

4. The latter court, on receipt of records and appearance of the accused before the said court, framed charges for the offences punishable under Sections 55(g) and 8 (1) & (2) of the Abkari Act.

5. To the charge the accused pleaded not guilty and claimed to be tried. The prosecution therefore examined PWs 1 to 7 and had Exts.P1 to P11 marked. MOs 1 to 5 were got identified and marked.

6. After the close of prosecution evidence, the 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.

7. Finding that he could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. He chose to adduce no evidence.

8. The court below impressed by the evidence of PWs 1 and 2 and contemporaneous documents namely, Ext.P1 and also the Chemical Analysis Report came to the conclusion that the offences have been made out. Accordingly, conviction and sentence followed.

9. The learned counsel appearing for the appellant assailed the conviction mainly on the ground that there is no evidence at all to show that the premises from where the contraband articles were seized was owned by the appellant or was in the actual physical possession of the appellant. In order to fasten liability on the appellant, it was necessarily to be shown by the prosecution that either he owned the building or that he was in exclusive possession of the same. It is the exclusive conscious possession that constitutes the offence. For the above proposition, the learned counsel relied on the decision reported in **Radhakrishnan v. State of Kerala** (2009 (1) KHC 469). Apart from the fact that if he was in actual physical possession of the property, it is also

pointed out that Ext.P10 relates to the period 2003 to 2008 whereas. the incident occurred on 31.08.2002. The contention is that there is absolutely no evidence at all to show that who was in actual possession of the property as on 31.08.2002. The learned counsel for the appellant then pointed out that going by the mahazar and the evidence of PW1, three samples were taken namely, one from the arrack bottle, one each from each of the wash pots. However, only two samples were forwarded and that anomaly has been only overlooked by the court below. Objection is also taken to the search memo, which though PW1 would say was prepared on 31.08.2002 itself, reached the court only on 04.09.2002. These infirmities have been overlooked by the court below and therefore, the conviction and sentence cannot stand.

10. The learned Public Prosecutor on the other hand contended that there is no merit in any of the contentions raised by the learned counsel for the appellant. It was

pointed out that the evidence of PWs 1 and 2 are consistent and cogent and their evidence is also supported by the contemporaneous document namely, Ext.P1 mahazar said to have been prepared by PW1. The learned Public Prosecutor pointed out that no infirmity is pointed out in the evidence of PWs 1 and 2 and the prompt production of the material before the court adds credence to the prosecution case. In short, it is pointed out that there are no grounds made out to interfere with the conviction and sentence passed by the court below.

11. Probably, the learned Public Prosecutor is justified in her submission that going by the evidence of PWs 1 and 2, it could be said that the contraband articles were seized from a house. That the articles seized were contraband articles, admits of no doubt. The evidence of PWs 1 and 2 are consistent regarding the fact that on receiving reliable information from the forest officials, they along with other officers had proceeded to place of occurrence and seized

articles made mention of in Ext.P1 mahazar. Though the independent witnesses turned hostile, it is necessary to note that no ill-motive is suggested to either PWs 1 and 2 and it is not shown that they had any axe to grind against the accused. Their evidence passes scrutiny and it can therefore be held that the contraband articles were seized from the house as alleged. However, the question remains as to who is the owner of the building or who is in possession of the same. This aspect has been considered in the decision reported in **Radhakrishnan v. State of Kerala** (2009 (1) KHC 469) wherein, it was held as follows:

“6. Though it was suggested to PW 7 that sister and brother-in-law of revision petitioner were also staying in the house in question at the relevant time, that was denied by PW 7. He admitted in cross-examination that the house in question belonged to Kochukutty, father of revision petitioner and that at the relevant time, Kochukutty and his wife, Janaki (parents of revision petitioner) were also staying in the same house. PW 7 has not attempted to peruse the ration card of the

house nor has he verified the voters list. The only evidence adduced by the prosecution to show that the house in question was in the possession of revision petitioner is Ext.P2 and testimony of PW 6 which do not in any way go in favour of prosecution since, as per that evidence the property where the house is situated stood in the name of Kochukutty, father of revision petitioner. When the land where the house is situated belonged to Kochukutty, one has to presume in the absence of contra evidence that the house also belonged to Kochukutty. If the house belonged to Kochukutty, and particularly as he was also residing in that house, the articles kept in that house also, in the absence of contra evidence, should belong to him. In *Madhavi v. State of Kerala*, 1963 KLT 659 dealing with such a situation it was pointed out that:

“..... In cases where the facts warrant it, a presumption of possession of the article recovered from a house may be raised against such members of the household as are in a position to control its affairs provided they were aware of the presence of the offending article.....”.

Again in *Appukuttan Kasaba v. State of Kerala*, 1964 KLT 683 it was held dealing with a similar situation that:

“..... It has to be presumed that the head of the family is responsible for the contraband found in the house because according to common course of human conduct the head of the family can, if he does not desire its presence in his house, secure its removal irrespective of the wishes of the other members of the household.....”

In the case on hand, there is nil evidence to show that revision petitioner was the head of the family at the relevant time. I found from the evidence that the house belonged to and in the possession of revision petitioner's father Kochukutty. I also stated that documents like the ration card, voters list, etc. which may have indicated that revision petitioner was the head of the family were not collected by PW 7. As such, conviction of revision petitioner on the presumption that he was in possession of the contraband at the relevant time cannot be sustained.”

12. It is interesting to note that the name of the appellant is Yohannan. The Panchayat Building Tax Assessment Register produced is for the year 2003 to 2008. It must be noticed that the incident had taken place on 31.08.2002. The offence is prior to Ext.P10 and Ext.P10 serves no purpose. Apart from the above fact, in Ext.P10,

the owner is shown as Yohannan and the person in occupation is shown as Paili. The fact remains that Ext.P10 does not relate to the period in question. Even if one is to accept Ext.P10, that does not advance the case of prosecution at all, for, the person according to the Police Officers, who is in possession was Yohannan whereas, in Ext.P10, the person in occupation of the property is shown as Paili. It is surprising to note that the Investigating Officer did not feel it necessary to verify any of the records namely, ration card, electoral card etc. Whatever that be, Ext.P10 cannot be of much help. The question as to the necessity for the prosecution to prove the actual physical possession of the house in question was dealt with in **Radhakrishnan's** case (supra). The facts in the above decision is almost similar to the one on hand and the court in the said decision held that unless it is specifically shown that the contraband article was in the actual physical possession or control of the accused concerned, he cannot be held liable. In the case on

hand, there is no evidence regarding the number of members in the family or who was the head of the family. In the light of these materials, it could not have been said that the offence is proved.

13. The finding of the court below, without advertng to these vital aspects, cannot be supported in law. It is a case where relevant materials have been overlooked by the court below.

For the above reasons, this appeal is allowed. The conviction and sentence passed by the court below are set aside and the accused stands acquitted of all charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

Sd/-
P.BHAVADASAN
JUDGE

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//True copy//

P.A. to Judge