

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. 67 of 2006 (A)

AGAINST THE JUDGMENT IN SC 491/2001 of ADDITIONAL DISTRICT &
SESSIONS COURT (FAST TRACK -I), THIRUVANANTHAPURAM
DATED 27-10-2005)

APPELLANT/(ACCUSED):

SURENDRAN, S/O. CHELLAPPAN,
VARUVILA VEEDU, NEAR ANUPAMA JUNCTION,
PERUNGUZHAY DESOM, AZHOOR VILLAGE,
THIRUVANANTHAPURAM DISTRICT.

BY ADV. SRI.M.R.RAJESH

RESPONDENT/(COMPLAINANT):

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

BY ADV. PUBLIC PROSECUTOR SMT.S. HYMA.

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.67 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 offence punishable under Section 55(a) of Abkari Act. He was found guilty and therefore convicted and sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs.1 lakh with default clause of rigorous imprisonment for one year.

2. The incident is said to have taken place on 06.02.1998. The claim made by the prosecution is that PW5, Sub Inspector of Police, who was on patrol duty along with other officers happened to see the accused coming along with a can and he was intercepted and the can was examined. It was detected that he was carrying about 6 liters of arrack in the can having a capacity of 10 liters. He sealed the can and samples were taken from the can and seized the same under Ext.P1 mahazar. He returned to the Police Station along with the articles seized and the accused and registered a crime as per Ext.P4 F.I.R. He produced the

accused before court. He conducted the investigation. PW4 is the successor in office of PW5. After verifying the records, he laid charge before court.

3. The Judicial First Class Magistrate Court-1, Attingal before whom final report was laid took cognizance of the offence and after issuing summons to the accused and on appearance of the accused, case was committed to Sessions Court, Thiruvananthapuram. The said court initially made over the case to Assistant Sessions Court, Attingal for trial and disposal and subsequently to Additional District & Sessions Court (Fast Track-II), Thiruvananthapuram.

4. When the accused appeared before the trial court, after following the usual formalities, charge was framed. To the charge, accused pleaded not guilty. The prosecution, therefore, examined PWs 1 to 5 and had marked Exts.P1 to P4. M.Os 1 and 2 were also marked.

5. 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 the accused could not be acquitted under Section 232 Cr.P.C, he was asked to enter on his defence. But he chose to adduce no evidence.

6. On evaluation of the materials before it, the trial court came to the conclusion that the offence under Section 55(a) of the Abkari Act has been clearly made out and therefore convicted and sentenced the accused as already mentioned. The said conviction and sentence are assailed in this appeal.

7. Learned counsel appearing for the appellant contended that this is a false case foisted against the accused with ulterior motive and there is inordinate delay in producing the articles before court and that is sufficient to set aside the conviction and sentence. It is also pointed out that the detecting officer was bound to retain one sample in the court and that is conspicuously absent in the present case and that vitiates the conviction. It is also contended that the oral evidence is not convincing enough to hold that the accused is guilty of the offence.

8. PW5 is the detecting officer. He speaks about the incident. According to him, on 06.02.1998, while he was on

patrol duty along with other officers, he happened to come across the accused with contraband articles. He speaks about the procedure then followed by him and also the seizure of contraband articles. He gives evidence regarding preparation of Ext.P1 mahazar and registration of crime as per Ext.P4 F.I.R. He then speaks about the investigation conducted by him and laying of final charge before court. PW3 is an officer who was on patrol duty along with PW5. He also speaks in tune with the evidence furnished by PW5.

9. It is contended on behalf of the accused that except for the interested testimony of PW3, there is no convincing evidence to show that the two independent witnesses namely, PWs 1 and 2 support prosecution case. Learned counsel pointed out that the detection was in the dead of night and the accused had a case that he was in an inebriated stage and for that purpose, false case has been foisted on him. Even though PWs 1 and 2 denied of having seen PW5 actually seizing the articles and sampling and preparing mahazar etc., they admitted their signatures in the mahazar prepared by PW5. That evidently shows that they were

present at the spot.

10. PW4 is the officer who laid charge before court. Learned counsel appearing for the appellant contended that two samples had taken and one of the samples had to be retained in the court. In the case on hand, both samples were sent for examination and that has caused considerable prejudice to the accused. The chemical analysis report shows that two sealed bottles marked 1 and 2 each containing 200ml of clear and colourless liquid alleged to be arrack were forwarded for chemical analysis. It is also stated that the seals on the bottles were intact and found tallied with the sample seal provided. The property list produced before court shows that sample from M.O.1 can is lost due to lapse of time. The court below has considered the matter in detail and has found that even the mahazar mentions about taking of samples from two bottles and merely on the ground that samples were taken from M.O.1 can and not from M.O.2 series two bottles, it cannot be said that the samples sent for examination were not the one taken from M.O.1 can and that is not a ground to be found in favour of the accused.

11. As rightly noticed by the court below, evidence of PWs 3 and 5 is above board and there is no reason as to why they should falsely implicate the accused. No suggestion is also made in that regard. There is no previous enmity between the accused and PW5. The court below was therefore justified in finding that the contraband articles were seized from the possession of the accused.

12. Next question that arises for consideration is what is the offence committed by the accused. The court below has found that offence is made out under Section 55(a) of Abkari Act.

13. It is difficult to accept the above proposition laid down by the court below. In order to attract Section 55(a), possession should be for import and export. In order to attract Section 58, possession should be with conscious knowledge. To be more precise, Section 58 is attracted only when the accused possesses contraband articles with the knowledge that that is unlawfully imported, transported or manufactured or knowing that duty has not been paid. There is no allegation to support the offences under Sections 55(a) or 58. Similar issue was considered in the

decision in **Josekutty vs. State of Kerala** (2013 (1) KLT 434) wherein it was held as follows:

“8. The final report submitted shows that there is no allegation that the petitioner was in possession of the illicit liquor with the knowledge that it is illicit liquor. So also, none of the prosecution witnesses has a case that petitioner had the knowledge that he was holding a can containing illicit liquor. In such circumstances, possession of liquor with the knowledge that it is illicit liquor, cannot be assumed. Hence, in the absence of evidence, petitioner can only be convicted for the offence under S.63 of the Kerala Abkari Act, S.63 as it then stood, provides only the sentence of fine. The learned counsel for the revision petitioner submitted that the revision petitioner is no more. The learned Public Prosecutor also submitted that the revision petitioner died on 24.4.2003. In such circumstances, there cannot be a default sentence”.

There is no reason as to why the principles laid down in the above decision should not be applied to the facts of the present case. The only provision that is attracted is Section 63 of Abkari Act.

For the above reasons, while upholding the conviction, the sentence imposed by the court below is set aside and the accused

is sentenced to pay a fine of Rs.3,000/-, in default of which he shall suffer simple imprisonment for three months.

Sd/-

**P.BHAVADASAN
JUDGE**

smp

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P.A to Judge.