

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

FRIDAY, THE 18TH DAY OF DECEMBER 2015/27TH AGRAHAYANA, 1937

CRL.A.No. 82 of 2006 ()

AGAINST THE JUDGMENT IN SC 699/2004 of ADDITIONAL DISTRICT COURT
(ADHOC-I), THODUPUZHA DATED 21-11-2005

AGAINST THE ORDER IN CP 48/2004 of J.M.F.C. - I, IDUKKI

APPELLANT:

JOSHWA, S/O.SAMUEL,
MURIKANANICKAL HOUSE, KOCHU CHELACHUVADU
KANJIKUZHI VILLAGE.

BY ADVS.SRI.T.J.MICHAEL
SRI.P.NOOR SEMIR

RESPONDENT:

STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR.

BY PUBLIC PROSECUTOR SRI.JIBU P.THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 18-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. RAMAKRISHNAN, J.

.....
Crl.A.No.82 of 2006
.....

Dated this the 18th day of December, 2015

JUDGMENT

The second accused in S.C.No.699/2004 on the file of the Additional Sessions Court (Adhoc-I), Thoupuzha is the appellant herein. The appellant along with his son were charge sheeted by the Excise Inspector, Idukki excise range in Crime No.29/2002 of that range under section 8(1) and (2) of the Abkri Act.

2. The case of the prosecution in nutshell was that on 23.12.2002 at 3.30 p.m, the accused persons were found to be in possession of 2.25 litres of arrack in the house with No.6/414 (newNo.6/553 of Kanjikuzhy grama Panchayat standing in the name of the appellant in violation of the provisions of the Abkari Act and thereby they have committed the offence punishable under section 8(1) and (2) of the Abkri Act.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court, Idukki, where it was taken on file as C.P.No.48/2004. After complying with the formalities, learned Magistrate committed the case to Sessions Court, Thodupuzha under section 209 of the Code of Criminal Procedure (hereinafter referred to as 'the Code'). After

committal, the Sessions Court took cognizance of the case as SC.No.699/2004 and made over to the Additional Sessions Court (Adhoc-I), Thodupuzha for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under section 8(1) and (2) of the Abkari Act was framed and the same was read over and explained to them and they pleaded not guilty. In order to prove the case of the prosecution, Pws 1 to 7 were examined and Exts.P1 to P11 and Mo1 were marked on their side. After closure of the prosecution evidence, the accused were questioned under section 313 of the Code and they denied all the incriminating circumstances brought against them in the prosecution evidence. They have further stated that they have not committed any offence and they have been falsely implicated in the case. Since evidence in this case did not warrant an acquittal under section 232 of the Code, the accused were called upon to enter on their defence, but no defence evidence was adduced on their side.

5. After considering the evidence on record, the court below found the first accused and the second accused, who is the present appellant, not guilty for the offence under section 8

(1) and (2) of the Abkari Act and acquitted them of that charge but found the second accused, who is the appellant herein, guilty under section 64A of the Abkari Act and convicted him thereunder and sentenced him to pay a fine of Rs.25,000/-, in default, to undergo simple imprisonment for six months. Aggrieved by the same, the present appeal has been preferred by the appellant, second accused before the court below.

6. Heard Sri. Jibu P. Thomas, learned Public Prosecutor and perused the records.

7. Learned Public Prosecutor submitted that the court below was perfectly justified in convicting the appellant for the offence under section 64A of the Abkari Act and he is the owner of the house and he has the responsibility to see that no contraband articles are kept in the house. It cannot be said that it was done without his knowledge as the first accused is none other than the son of the appellant.

8. The case of the prosecution as emerged from the prosecution witnesses was as follows:

On 23.12.2012 at about 3 p.m while PW4 along with PW1 were doing patrol duty, when they reached near Kanjikuzhi SNHS junction, they got information that the first accused was

selling arrack from his house and accordingly he had prepared Ext.P4 search memo and sent the same to court and thereafter conducted search of the house in the presence of Pws 5 and 6 and found MO1 kannas kept in the kitchen of the house and the first accused was there in the house. So he arrested the first accused and prepared Ext.P11 arrest memo and gave Ext.P10 arrest intimation to his mother, who was present in the house. On verification of the kannas, he found that it contained 2.5 litres of some liquid, which on verification he was satisfied that it was arrack. So he took sample from the liquid in the kannas, sealed and labelled the same and he sealed and labelled the kannas also and prepared Ext.P9 search lit and seized the same as per Ext.P1 mahazer in the presence of Pws 5 and 6. He came to the excise office and registered Ext.P5 crime and occurrence report and produced the first accused before court along with the remand report. He prepared Ext.P6 property list and produced the contraband articles seized before court. He sent Ext.P7 forwarding note with a request to send the sample for analysis and sample was sent from court and Ext.P8 chemical analysis report obtained. Investigation in this case was conducted by PW7, the successor of PW4. He

questioned the witnesses and recorded their statements. As per his request, PW2, the Secretary of the Panchayat, issued Ext.P2 ownership certificate of the house. As per the request of the investigating officer, PW3 prepared Ext.P3 sketch plan of the place of occurrence. Since it was found that the house stands in the name of the second accused, he gave a report to add the second accused also in the array of accused. He completed the investigation and submitted final report.

9.The court below after appreciation of evidence, acquitted the first accused for the offence under section 8(1) and (2) of the Abkari Act. The second accused, who is the appellant herein was also not found guilty for the offence under section 8(1) and (2) of the Abkari Act. But he happened to be the owner of the house, he has been found guilty for the offence under section 64A of the Abkari Act and convicted for the said offence. It may be mentioned here that final report in this case was filed only for the offence under section 8(1) read with 8(2) of the Abkari Act. Even at the time of framing charge, section 8(1) and (2) of the Abkari Act alone was framed against the accused persons and no charge under section 64A of the Abkari Act was framed against the second accused and there is

no opportunity for him to meet such a charge in this case. There is no reason given by the appellate court in the judgment as to how without framing charge for the offence under section 64A of the Abkari Act, the second accused can be convicted for such offence.

10. Section 64A of the Abkari Act reads as follows:

64A. Penalty for allowing land, building, room etc. for manufacture, sale or storing for sale of liquor or intoxicating drug:- Notwithstanding anything contained in this Act, or in any other law for the time being in force, any owner or occupier or person having control of, any land, building, room, space or enclosure, permits any person to use such land, building room, space or enclosure for manufacture sale or storing for sale of liquor or intoxicating drug in contravention of this Act or of any rule or order made thereunder or of any licence or permit obtained under this Act shall be punishable with fine which shall not less than twenty-five thousand rupees unless he proves to the satisfaction of the court that all due and reasonable precautions were taken by him to prevent such use".

11. So in order to convict the accused for the said offence, it must be proved by the prosecution that the owner or occupier

of the house has permitted any person to use such land, building, room or place for manufacture, sale or stocking of liquor or intoxicating drug in contravention of the Act. So in order to attract such an offence, the prosecution has got duty to allege and prove that being the owner of the house, appellant had permitted any person to keep or store the contraband article in the house. Admittedly, the second accused was not there in the house at the time when the seizure was effected. Ext.P2 is the ownership certificate issued by PW2 and there is nothing mentioned in Ext.P2 that he is occupying the house. It is true that in order to attract an offence under section 64A, owner of the house is also sufficient but it must be proved by the prosecution that he permitted another person to keep or store article in his house. There is nothing on record to show that he was also residing in the house along with his son and he had knowledge that article was stored in the house and knowing that he had permitted him to keep the same in the house. In the absence of such an evidence, merely because he happened to be the owner of the house, it cannot be said that he had permitted any other person to store the contraband article in the house or he had knowledge about the storing of the

contraband article in the house at the relevant time. So, under the circumstances and in the absence of such evidence and also in the absence of any specific charge framed against the accused, the court below should not have convicted the appellant for the offence under section 64A of the Abkari Act and the reasons given by the court below and consequential conviction in the absence of any specific charge for that purpose against the appellant is illegal and unsustainable in law and the same is liable to be set aside. The appellant is entitled to get acquittal of the charge for which he was convicted for the reasons stated above. In view of the finding that the appellant is entitled to get acquittal, the sentence imposed is not proper and the same is set aside.

In the result, the appellant succeeds and the appeal is allowed. The order of conviction and sentence passed against the appellant under section 64A of the Abkari Act are hereby set aside. He is acquitted of the charge for the offence for which he was convicted giving him the benefit of doubt. He is set at liberty. The bail bond executed by him stands cancelled. The court below is directed to refund the fine amount, if any, remitted by the appellant to him on making necessary

application in that regard.

Office is directed to communicate a copy of this judgment to the concerned court at the earliest.

Sd/-
K. RAMAKRISHNAN, JUDGE.

cl

/true copy/

P.S to Judge

