

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 17TH DAY OF NOVEMBER 2015/26TH KARTHIKA, 1937

CRL.A.No. 151 of 2006

AGAINST THE JUDGMENT IN SC 340/2005 of ADDL. SESSIONS
COURT/SPECIAL COURT FOR NDPS ACT CASES, THODUPUZHA DATED
22.12.2005

APPELLANT/ACCUSED:

VASU, S/O.KESAVAN, PUTHUPARAMBIL HOUSE,
THOPRAMKUDY KARA, VATHIKUDY VILLAGE.

BY ADVS.SRI.N.A.MURALEEDHARAN
SRI.M.KRISHNAN

RESPONDENT/COMPLAINANT:

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

BY SMT. S. HYMA, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
17-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 151 of 2006

Dated this the 17th day of November, 2015.

JUDGMENT

The accused was prosecuted for the offences punishable under Section 55(a) and (i) of the Abkari Act. After trial, he was found guilty of the offence under Section 63 of the Abkari Act. He was therefore convicted and sentenced to undergo simple imprisonment for one year.

2. P.W.6, who at the relevant time, i.e. on 21.1.2004 was functioning as the Circle Inspector of Police, Idukki, on instructions from the Superintendent of Police conducted raid within the territory of Murikkassery police station. At 8.45 p.m. they reached Thoprakudy junction. P.W.6 received reliable information that the accused had stored liquor for sale. He prepared search memo and entrusted it to P.C.2268 to be taken to court, copy of which is produced as Ext.P8. P.W.6 along with two independent

witnesses visited the shop run by the accused and conducted a search there. In between the bed room and kitchen, below a cot, a plastic packet was found by P.W.6. He examined the contents therein. It was found that the packet contained three bottles of Majestic rum each having capacity of 1 litre, two bottles of Majestic brandy having capacity of 375 ml. and one bottle of Power XXX rum having capacity of 375 ml. P.W.6 opened the bottles and after having been satisfied about the nature of the liquor contained in those bottles, took sample from the same. He took samples which were numbered as S1 to S6. He prepared Ext.P1 search list in which the witnesses and he signed. Arrest memo is marked as Ext.P9.

3. P.W.6 thereafter entrusted the accused, the articles seized and the records to Murikkasserry police station within whose jurisdiction the offence has taken place. At Murikkasserry police station, C.W.8, who was in charge of the station then received the article, accused and the documents

from P.W.6. He is no more. Investigation was initially conducted by P.W.7, who recorded statements of witnesses. He prepared Ext.P11 forwarding note and sent it to court and obtained chemical analysis report Ext.P12. Investigation was completed by P.W.8 who 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 under Section 209 Cr.P.C. The said court made over the case to Additional Sessions Court, Thodupuzha for trial and disposal.

5. The latter court, on receipt of records and on appearance of the accused framed charge for the offences punishable under Sections 55 (a) and (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 8 examined and had Exts.P1 to P15 marked. M.Os. 1 to 5 were got

identified and marked. After the close of the 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. He added that the Additional Sub Inspector of Thodupuzha was restrained by the people of the locality, and the police wanted the accused to give evidence in favour of the ASI. The accused was not prepared to do so and therefore, he was falsely implicated. Finding that the accused could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. He chose to adduce no evidence.

6. Mainly on the basis of the evidence of P.Ws. 6 and 3 and also Ext.P1, with which the court below was impressed, came to the conclusion that the prosecution has proved the possession of the contraband article by the accused. However, the court below found that the offence under Section 55(a) and (i) of the Abkari Act cannot be

attracted to the facts of the case. The contraband being IMFL, the accused could at best be made liable for possessing excess quantity than the permissible limit and therefore, he was convicted and sentenced under Section 63 of the Abkari Act.

7. Assailing the conviction, learned counsel appearing for the appellant contended that the improper sampling made the prosecution case weak and the evidence regarding the seal used is ambiguous. Admittedly, the person who had detected the offence is Circle Inspector of Idukki who claims that he was acting under the instructions of Superintendent of Police at the relevant time. He says that he conducted a search of the shop owned by the accused at Murikkasserry and seized the contraband article. In this regard, he gets support from the evidence of P.W.3 who accompanied him for the search.

8. Learned counsel appearing for the appellant pointed out that on a reading of the evidence of P.W.6, it becomes evident that the samples were taken at the spot and sealed. But towards the end of Ext.P1, it is mentioned that the seal of Murikkasserry police station has been used. This, according to the learned counsel, is inconceivable in the sense that P.W.6 had started from Idukki Police Station and he could not have carried the seal of Murikkasserry police station. Therefore, he could not have affixed the sample seal said to have been found on the samples. The possible explanation is that no seal was affixed at the time of taking samples and it was affixed at a later point of time when the articles were handed over to Murikkasserry police station. This shows the infirmity in sampling and there is no guarantee that the sample sent for chemical analysis is the sample taken from the contraband alleged to have been possessed by the accused. On that sole ground, learned counsel pointed out that the

accused is entitled to succeed.

9. Learned Public Prosecutor on the other hand contended that forwarding note contained the specimen seal and the chemical analysis report shows that the seal found on the sample tallies with the specimen seal forwarded to the laboratory. It is also pointed out by the learned Public Prosecutor that the rent deed under which the accused was occupying the premises was admitted by the accused and the accused cannot say that there is no proof of his possession. Evidence of P.Ws. 3 and 6 taken along with Ext.P1 is sufficient to prove prosecution case. At any rate, according to the learned counsel, the court below was impressed with those documents and it could not be said that the findings are perverse as well as no interference is called for.

10. It is by now well settled that mere seizure of article is not sufficient to constitute offence under the Abkari Act. It has to be proved beyond reasonable doubt that the

accused is in possession of contraband article that is prohibited or the particular article is in excess than the permissible limit. In the case on hand, the articles seized have already been referred to. The evidence of P.W.6, who claims to have been acting under the instructions of the ASP of Idukki shows that he conducted a search of the shop belonging to the accused at Thoprakudy and seized the articles. He would in Ext.P1 say that he had taken sample of the contraband article at the place itself and sealed the same. He then speaks about having arrested the accused and proceeded to Murickasserry police station. In this regard, he gets sufficient support from P.W.3 also who had accompanied him at the relevant time. However, surprisingly towards the end of Ext.P1 which the search list said to have been prepared by P.W.6, it is mentioned that the seal used is that of Murikkasserry police station.

11. The above narration in Ext.P1 creates difficulties. If as a matter of fact one is to believe that P.W.6 had sealed the sample at the place of occurrence itself, he could not have been in possession of the seal of the Murikkasserry police station. If the seal found on the sample is that of Murikkasserry Police Station, obviously it follows that sealing was not at the place of occurrence. There is thus ambiguity regarding the sealing of the article and the balance contraband article. It is true that in Ext.P15, the Analyst has reported that the seal found on the sample taken for analysis tallies with the sample seal provided.

12. But that may not be sufficient. There is no evidence in this case to show as to how the seal of Murikkasserry police station happened to be affixed on the sample and the balance contraband article. P.W.6 does not say so. His version, as already stated, was that he had taken sample at the date of occurrence it self. The result is that one

is not sure whether the samples were sealed and if that be so, it creates reasonable doubt as to whether the sample sent for chemical analysis is the sample taken from the contraband article seized from the possession of the accused. If that be so, the benefit of doubt should reasonably go to the accused.

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 is acquitted of the charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

P. BHAVADASAN,
JUDGE

sb.