

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 16TH DAY OF DECEMBER 2015/25TH AGRAHAYANA, 1937

CRL.A.No.235 of 2006

AGAINST THE JUDGMENT IN SC 440/2004 of ADDL.SESIONS COURT
FAST TRACK -III (ADHOC), MANJERI DATED 13-01-2006

APPELLANT-ACCUSED:

NAMBI ALIAS VELAYUDHAN,
SON OF PAZHAMBALAKKOTT NARAYANAN CHETTIAR,
AMARAMBALAM, POTTIKKALLU, NILAMBUR.

BY ADV. SRI.V.G.ARUN

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
16-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.235 OF 2006

Dated this the 16th day of December, 2015.

J U D G M E N T

The accused was prosecuted for the offence punishable under Section 55(g) of Abkari Act. He was found guilty and was therefore convicted and sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs.1 lakh with default clause of simple imprisonment for three months. Set off as per law was allowed.

2. The prosecution case in brief is that on 10.09.2002 while PW1 who was functioning as Preventive Officer of Nilambur Excise Range and PW2, the Guard of the same Department along with other officers were on routine patrol duty and while they were passing through the Panchayath road, they happened to see the accused engaged in stirring something in his compound. Feeling suspicious, Excise team went to the spot and found that in the garden land belonging to the accused, they were able to

see a can of 35 litres capacity containing 30 litres of liquid and he was seen stirring the same. By taste and smell, the contents was identified as wash. On examination of the premises, at about 10 feet away from the can so located, they were able to locate another can of 35 litres capacity containing full of liquid. On examination of the contents of that can, it was convinced that that too contained wash. PW1 would say that he took two samples of wash of 750ml from each of the cans and the rest were destroyed and the cans were sealed and labeled so also the sample taken from the articles. The first of the cans which was seized was labeled as 'A' and the second one as 'B'. They then prepared Ext.P1 mahazar and had the accused arrested as per Ext.P2 arrest memo. Then they returned to the office and PW1 would say that the articles and accused were entrusted to the Excise Guard.

3. PW5 was the Excise Inspector of Nilambur Excise Range at the relevant time. When he came to the office at 8 a.m, a Guard by name Venugopalan who had received the articles on the previous day handed over the same to PW5 who registered crime

as per Ext.P4 occurrence report. He prepared Ext.P5 property list and Ext.P6 forwarding note and had the accused as well as the contraband articles seized produced before court.

4. PW7 took over the investigation of the case. He went to the place of occurrence, inspected the site, recorded the statement of witnesses and obtained document showing that the place from where the article was seized belonged to the accused. The chemical analysis report obtained by him is Ext.P9. He completed the investigation and laid charge before court.

5. The court before which final report was laid took cognizance of the offence and on finding that the offence is exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Manjeri under Section 209 Cr.P.C. The said court made over the case to Additional Sessions Court Fast Track-III (Ad hoc), Manjeri for trial and disposal. The latter court, on receipt of records and on appearance of accused, framed charge for the offence under Section 55(g) of Abkari Act. To the charge, accused pleaded not guilty and claimed to be tried.

6. The prosecution, therefore, had PWs 1 to 7 examined and Exts.P1 to P11 marked. M.O.s 1 to 3 were got identified and marked.

7. After the close of the prosecution evidence, accused was questioned under Section 313 Cr.P.C wherein he denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent.

8. 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.

9. The court below, based on the evidence of PWs 1 and 2 and Ext.P1 mahazar and also the chemical analysis report Ext.P9, came to the conclusion that the prosecution has established the case against the accused beyond reasonable doubt and therefore convicted and sentenced him as already mentioned.

10. Assailing the conviction and sentence, learned counsel appearing for the appellant contended that there is no allegation much less in proof to the effect that even assuming that wash was seized from the possession of accused, it was for the purpose

of manufacturing liquor and it was the essential ingredient for attracting the offence under Section 55(g) of Abkari Act. For the above proposition, learned counsel relied on the decisions in Crl. Appeal Nos.748/2007, 976/2007 and Crl.M.C.No.201/2007. It is also pointed out by the learned counsel that there is no evidence in this case to show that wash which was possessed by the accused was for the use of manufacture of liquor or that he himself was engaged in the act of distillation. In the absence of any proof in that regard, offence cannot lie. Relying on the decision in Crl. Appeal No.1146/2003, learned counsel pointed out that it will be hazardous in the case of present nature as has been held in the decision to place implicit faith on the evidence of the official witnesses to find the accused guilty. There should have been some corroborative evidence to support the evidence of public officers. Learned counsel then went on to point out that the Village Officer who prepared the sketch has not been examined and so also it is contended that no material which would indicate that accused is actually engaged in distillation of liquor for which wash is to be used or he has any part to play in

the manufacture of liquor is established by the prosecution. In the absence of evidence to that effect, it could not be said that Section 55(g) is attracted.

11. Meeting the above contentions, learned Public Prosecutor pointed out that the decisions relied on by the learned counsel for the appellant must be confined to the facts of those cases and they do not lay any general proposition. In two of the decisions, learned Public Prosecutor indicated that presumption under Section 64 of Abkari Act has not been taken note of and the decision rendered without taking note of that presumption cannot be held to be binding at all. There is nothing to show that wash can be used for any other purpose other than distillation of liquor. If one is to insist that apart from possession of wash by a person concerned, there must be at least something to show that the person concerned does the act of distillation, that would have been given a freedom for the person to manufacture wash. That is not the purpose of the Act. Once it is shown that wash is possessed by the accused, it is for the accused to show under what circumstance he was in possession of the same and it is not

for manufacture of liquor.

12. With regard to the decisions and placing of reliance on the evidence of official witnesses, learned Public Prosecutor pointed out that the decision was rendered in the context where there was prior knowledge to the detecting officer and still they did not prepare search memo and went on to search without meeting the statutory requirements. That is not so in the case on hand. It was an accidental detection and so that the ingredients necessary to attract the decision is not available in the case on hand. Learned Public Prosecutor pointed out that the lower court has considered all the aspects in considerable detail and there is no merit in the appeal.

13. Of course, evidence regarding detection of wash which seems to be the subject matter of this proceedings is confined to the testimony of PWs 1 and 2, the two official witnesses, among whom PW1 is the Preventive Officer and PW2 is the Guard. There is no case for the appellant that PW1 was not competent to detect the offence. The version given by PWs 1 and 2 is that as they were going along during patrol duty, they happened to

see the accused engaged in the act of stirring something in his compound and that attracted their attention. They went to the spot and found that he is stirring wash. They were also able to see another can and at about 10 feet away from the can so located, they found another can. Both of them say that by taste and smell, they were able to identify the contraband article as wash. They also say about having taken two separate samples from the cans and they were uniform in their version that after taking sample, rest of the wash was destroyed. It is true that two independent witnesses namely, PWs 3 and 4 betrayed the prosecution. They, however, admit their signatures on the documents concerned. However, they denied having seen the actual seizure.

14. In the case relied on by the learned counsel for the appellant with reference to the acceptability of the evidence of official witnesses, as rightly pointed out by the learned Public Prosecutor, the decision in that case must be confined to the facts of the said case. That was a case where the officers concerned had prior intimation of the illegal activity being carried

on by the accused in which case, they had to form an intention to search the house and they were bound in law to prepare search memo and sent it to court before search is conducted. That was a case where there was prior knowledge of the activity being carried on by the accused.

15. In the case on hand, a reading of the evidence of PWs 1 and 2 leave one in no doubt that it was an accidental detection. They had no prior knowledge. The question of preparing search memo does not arise for consideration. Therefore, the decision relied on by the learned counsel for the appellant is clearly distinguishable on facts. Section 55(g) reads as follows:

"55. For illegal import, etc.- Whoever in contravention of this Act or of any rule or order made under this Act

xxxx

(g) uses, keeps, or had in his possession any materials, still, utensil, implement or apparatus whatsoever for the purpose of manufacturing liquor other than toddy or any intoxicating drug".

16. Emphasis is laid by the learned counsel for the appellant on the words 'for the purpose of manufacturing liquor'. It is contended on behalf of the appellant that there has to be positive allegation and there has to be some amount of evidence to show that wash which is seized from the accused is intended for the manufacture of liquor or that the accused is actually engaged in manufacture of liquor. Mere possession of wash by itself cannot be an offence so says the learned counsel. In support of this contention, three decisions earlier mentioned have been relied on.

17. In the decision in Crl. Appeal No.748/2007, it was held as follows:

"6. The prosecution case is that the appellant was found in possession of 55 litres of wash for the purpose of illegal distillation of arrack and the same was stored adjacent to the house of the appellant. Section 55(g) of the Abkari Act reads as follows:-

(g) uses, keeps, or had in his possession any materials, still, utensil, implement or apparatus whatsoever for the purpose of manufacturing liquor other than toddy or any intoxicating

drug.

A reading of the above section would show that the prosecution must allege and prove that materials were kept for the purpose of manufacturing liquor. In this context, there is no evidence to show that materials were kept for the purpose of manufacturing liquor. Either PW1 or PW5 had not stated before the court that they had seen any materials or utensil for the purpose of distillation of arrack. In the above circumstances, this Court is of the view that the finding of the trial court that the appellant had committed an offence under section 55(a) of the Act is not sustainable. In this context, a decision reported in *Sudhepan @ Aniyam v. State of Kerala* (2005 (2) KLT (Cri) 631) is relevant. In the above decision this Court held that to attract an offence under section 55(a) of the Abkari Act, the prosecution must allege and prove that possession of the contraband liquor was incidental or in connection with export, import, transport or transit of liquor. Looking into the above angle, for applying section 55 (g) of the Abkari Act, it has to be pleaded and established that materials were kept for the purpose of manufacturing liquor. Therefore, the finding of the trial court that the appellant found guilty under section 55(g) of the Abkari Act is not legally sustainable".

18. In the decision in Crl. Appeal No.976/2007, it was held as follows:

"5. The trial court had considered the evidence of PW4 and found that the prosecution had succeeded in proving that the appellant committed an offence punishable under section 55(g) of the Abkari Act. As per Ext.P9 chemical analysis report, the first sample contained 4.78% ethyle alcohol and the second sample contained 8.65 ethyle alcohol by volume. PWs 1 and 2 stated that they did not see excise men searching the house of the appellant, seizing wash and arresting the appellant. The evidence of PW1 shows that he signed Ext.P1 at Padikappu at the request of the excise officials. The evidence of PW2 shows that he signed Ext.P1 at his shop. In this context, it is relevant to note that in Ext.P1 mahazar names of four excise officials were mentioned, but none of them was examined. It has come out in evidence that other persons were residing nearby or conducting shops nearby, but they were not made witnesses. Apart from the above, it is seen that there was no material other than MOs.1 and 2 to prove that the wash was kept for preparation of arrack. The case set up by the appellant is that the material objects were taken from a nearby estate and the case was foisted against him. For conducting a search in the house, it

is obligatory on the part of the authorized officer to comply with section 31 of the Abkari Act. There is no evidence to show that the above procedure was complied with by PW4. The prosecution case is that the appellant was found in possession of 45 litres of wash for the purpose of distillation of arrack and the same was stored in the house. The prosecution must allege and prove that the wash was kept for the purpose of manufacturing liquor. In this context, there is no evidence to show that the wash was kept for the purpose of manufacturing liquor. In the above circumstances, this Court is of the view that the finding of the trial court that the appellant had committed an offence under section 55(g) of the Act is not sustainable. In a decision reported in *Sudhepan @ Aniyam v. State of Kerala* (2005 (2) KLT (Cri) 631) this Court held that to attract an offence under section 55(a) of the Abkari Act, the prosecution must allege and prove that possession of the contraband liquor was incidental or in connection with export, import, transport or transit of liquor. Therefore, the finding of the trial court that the appellant found guilty under section 55(g) of the Abkari Act is not sustainable".

19. In the decision in Crl.M.C.No.201/2007, it was held as follows:

"8. Possession of materials whatsoever for the purpose of manufacturing liquor is the crux or gravamen of the offence under Sec.55(g) of the Abkari Act. Such possession must prima facie be indicated to be "for the purpose of manufacturing liquor". The short question is whether there is sufficient allegations or materials to that effect in this case.

.....

11. In short, there is no semblance of specific allegation which can indicate that the possession of the articles in question was for the purpose of manufacturing liquor. Possession simpliciter of articles which can be used for the purpose of manufacturing liquor also cannot in the absence of cogent and probative indications be assumed to be possession for the purpose of manufacturing illicit liquor as to justify indictment under Sec.55(g) of the Abkari Act. I am, in these circumstances, persuaded to agree that this is an eminently fit case where premature termination of the proceedings by invocation of the extraordinary inherent jurisdiction under Sec.482 of the Cr.P.C shall be justified. Lest, there be any confusion and to disabuse any such incorrect impression which may be carried, I make it clear that it is not the law that possession of such materials by itself will not amount to an offence under Sec.55(g) of the Abkari Act. The crucial

question is whether there is satisfactory allegations or materials to show that such possession was for the purpose of manufacturing liquor. I choose to invoke the jurisdiction under Sec.482 of the Cr.P.C in this case for the crucial reason that there is no worthwhile allegation or circumstances to indicate or suggest that the possession of the articles in question was for the purpose of manufacturing liquor”.

20. Taking the decision in Crl.M.C.No.201/2007 first for consideration, it would be seen from a reading of the same that the article involved in the case was jaggery and kareenja patta. This Court observed that jaggery and kareenja patta are not necessarily used for manufacture of liquor and it was being used for other purpose. In such circumstances, this Court held that it was incumbent on the part of the prosecution to prove that the article possessed by the accused was for the purpose of manufacturing liquor. It was held that in such case there should not only be allegation regarding possession of contraband article but should be some positive evidence to show that it is intended for manufacture of liquor. The said decision is clearly distinguishable on facts.

21. In the case on hand, it is wash that is recovered from the possession of accused. It is not shown or seen that wash can be used for any other purpose other than for manufacturing liquor. In such circumstances, the principles laid down in the decision referred to above can have no application to the facts of the case.

22. Coming to the other two decisions namely, in Crl. Appeal Nos.748 and 976 of 2007, no doubt true, to a great extent, support the contention put forward by the learned counsel for the appellant. But it should be noticed that in both the decisions, presumption available under Section 64 of Abkari Act has not been considered at all. Section 64 reads as follows:

“64. Presumption as to commission of offence in certain cases:- In prosecutions under Section 55, Section 55B, Section 56A, Section 57, Section 58, Section 58A and Section 58B it shall be presumed until the contrary is proved, that the accused person has committed an offence under that section in respect of any liquor or intoxicating drug, or any still, utensil, implement or apparatus whatsoever for the manufacture of liquor other than toddy or of any intoxicating drug, or any such materials as are

ordinarily used in the manufacture of liquor or of any intoxicating drug, of the possession of which he is unable to account satisfactorily; and the holder of a licence or permit under this Act shall be punishable, as well as the actual offender, for any offence committed by any person in his employ and acting on his behalf under Section 8 or Section 55 or Section 55B or Section 56 or 56A or Section 57 or Section 58 or Section 58A or Section 58B as if he had himself committed the same, unless he shall establish that all due and reasonable precautions were exercised by him to prevent the commission of such offence”.

23. A bare reading of the provision will show that once the prosecution proves possession of any liquor or intoxicating drug or any still, utensil, implement or apparatus for the manufacture of liquor or any intoxicating drug, the burden shifts to the accused to show that it was not intended for the manufacture of liquor. Of course, in the case on hand, the initial ingredients to prove the offence is certainly on the prosecution. The prosecution has to show that the accused was in possession of contraband article and also that it was intended for manufacture of liquor. In the case on hand, it is wash which is not shown to

be used for any other purpose other than manufacture of liquor. Moreover, in the charge framed, there is definite allegation that wash possessed was with the intention of manufacture of liquor. The mere fact that no apparatus or utensils was recovered from the place by the officers concerned indicating that wash which possessed by the accused was intended to be used for manufacture of liquor by him does not help the accused. It could be well that he was in possession of wash and handing over it to somebody for distillation and for manufacture of liquor. In such cases, it could not be said that the person concerned cannot be found guilty of the offence punishable under the Act. In the light of the presumption under Section 64 of Abkari Act, the two decisions relied on by the learned counsel for the appellant must be confined to the facts of those cases.

24. The next contention based on the non examination of Village Officer is without any basis whatsoever. It is not suggested to either PW1 or PW2 that the premises from where contraband article was seized does not belong to the accused. Even assuming that it does not belong to the accused, he was

actually caught red handed while engaged in the act of stirring something which is used for distillation of liquor. Therefore, it does not matter whether it was in his property or somebody's property as far as he was engaged in the act of stirring wash. In the light of the presumption available under Section 64, the contention that no utensils or apparatus are seized which would indicate that wash was possessed for distillation also does not call for any consideration at all.

25. Coming to the contention raised on behalf of the appellant that it will be hazardous to venture a finding of guilt based solely on the evidence of official witnesses, though may appear to be attractive, on a closer scrutiny, it can be without any basis. The law insists only that detection of offence shall be in the presence of two independent witnesses and it nowhere says that independent witnesses shall support the prosecution. In the case on hand, the independent witnesses admit their signatures on the documents concerned. But, they have, of course, stated that they did not actually seen the seizure of articles.

26. The evidence of PWs 1 and 2 have already been referred to. In spite of lengthy cross examination, they stood their ground and there is nothing brought out in their evidence to show that they are biased or they had any oblique motive or they had any axe to grind against the accused. Their evidence regarding detection is uniform and consistent and there is no reason to doubt their version. It is not the law that evidence of official witnesses have to be necessarily corroborated by independent evidence before the court hold the accused guilty. If the evidence of the official witnesses is sufficient to satisfy the mind of the court that the claim made by the prosecution is true, there is then no justification to look for corroboration. This proposition is well settled.

27. For the above reasons, none of the contentions raised by the learned counsel for the appellant caught hold water and the court below was justified in coming to the conclusion that the offence is made out and the conviction has to stand.

28. Faced with the above situation, learned counsel appearing for the appellant pointed out that the sentence

awarded is very harsh and severe and some leniency be shown in that regard. It is pointed out that accused is nearly 60 years of age as of now and 14 years have elapsed since detection of offence and it will be too harsh to maintain the sentence passed by the court below. It is also pointed out that the accused has no criminal antecedents and there is nothing to show that subsequently going on bail, he had engaged in such nefarious activities. At this distance of time, it will be too harsh to retain the sentence awarded by the court below. Considering the quantity and nature of commodity seized from the possession of accused, learned counsel pointed out that some leniency is warranted.

29. Though this Court should take the responsibility of the delay in disposing of the appeal, considering the nature of article seized and the passage of time, it is felt that if now one may look at the sentence, it would appear to be too harsh. Further, as rightly pointed out by the learned counsel for the appellant, there is no criminal antecedent pointed out as far as the accused is concerned and there is no allegation that subsequent to being

released on bail, he is engaged in such questionable activities. Of course, a person can reform himself always and there should be an opportunity for him to do so. Considering the nature of offence committed by the accused and also considering his age, it is felt that leniency is warranted with regard to sentence. It is seen that during pre-trial stage, he has been in custody for nearly two months. While looking at the sentence imposed, it is obvious that circumstances would have been considerably changed and that fact will have to be taken note of by the Court while confirming the sentence and this Court is duty bound to say that this is not to see the offence lightly but to say that some leniency is warranted considering the facts and circumstances of the case.

30. Considering the nature of offence alleged against him and also the passage of time, it is felt that it is only proper that this Court confines the sentence to the period of detention already undergone by him as regards the substantive sentence is concerned and fine of Rs.1 lakh is retained with default clause of 15 days imprisonment.

In the result, this appeal is partly allowed. The conviction is upheld but the sentence imposed by the court below is set aside and instead the sentence of imprisonment stands confined to the period of detention already undergone by the accused and he is directed to pay a fine of Rs.1 lakh in default of payment of which he shall suffer simple imprisonment for 15 days.

Sd/-

**P.BHAVADASAN
JUDGE**

smp

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P.A to Judge.