

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 13TH DAY OF NOVEMBER 2015/22ND KARTHIKA, 1937

CRL.A.No. 372 of 2006 ()

**AGAINST THE JUDGMENT IN SC 157/2004 of ADDITIONAL SESSIONS COURT FAST
TRACK - I, (ADHOC), MANJERI**

APPELLANT(S)/ACCUSED:

**SATHYAPRAKASH, S/O.SUKUMARAN,
CHUNGATHARA AMSOM, PATHIRIPPADAM DESOM, NILAMBUR TALUK
MALAPPURAM DISTRICT.**

BY ADV. SRI.K.SHIBILI NAHA

RESPONDENT(S)/COMPLAINANT & STATE:

1. THE EXCISE INSPECTOR, NILAMBUR RANGE.

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

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 13-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

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P.BHAVADASAN, J.

Crl.A. No. 372 of 2006

Dated this the 13th day of November, 2015

J U D G M E N T

The accused was prosecuted for the offence punishable under Section 8(1) of the Abkari Act. He was found guilty. He was therefore convicted and sentenced to suffer rigorous imprisonment for three years and to pay a fine of ₹1 lakh with a default clause of simple imprisonment for a further period of one year. Set off as per law was allowed.

2. The incident in this case is said to have occurred on 07.06.2002. PW1 at the relevant time was working as the Preventive Officer in the Excise Enforcement and Narcotic Special Squad, Malappuram. On the date of incident, he along with PW2 and other officers had been conducting routine patrol duty. When they reached in front of the house of one Antony situated on the Panchayath road, they saw a person standing near the culvert with a sack. When the torch was lit by the Excise Officers, it is stated that the

accused tried to retrace his steps. He was intercepted and the sack was seized. It was found to contain a can having a capacity of 5 litres and a bottle having a capacity of two litres. By smell and taste, it was revealed that both the can as well as the bottle contained arrack. After preparing Ext.P1 arrest memo, the accused was arrested. As contents of both the containers looked alike, sample of 200ml was taken in a bottle and it was sealed and labelled. So also the balance contraband article. Labels affixed on the sample bottle and the contraband article contained the signature of PW1. The mahazar prepared is Ext.P2. They returned to the Station along with the accused and the contraband articles and prepared Ext.P4 occurrence report. The next day morning, he entrusted the accused, articles and the documents to the Range Office at Nilambur. PW4 received the accused, articles and the documents and registered crime No. 11/2002 of that office. He prepared Exts.P7 and P8 property list and forwarding note and had the documents

and accused produced before court. PW5 conducted investigation in the case. He recorded statement of witnesses, obtained Chemical Analysis Report Ext.P9 and after completing investigation, submitted charge before court.

3. The court before which the final report was laid, took cognizance of the offence and finding the offence to be exclusively triable by a Court of Sessions, committed the case to Sessions Court, Manjeri under Section 209 of Cr.P.C. after following the necessary procedures. The said court made over the case to Additional Sessions Court, Fast Track-I (Ad hoc), Manjeri, 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 offence punishable under Section 8(1) of the Abkari Act.

5. To the charge the accused pleaded not guilty and claimed to be tried. The prosecution therefore had PWs 1 to

5 examined and had Exts.P1 to P10 marked. MOs 1 and 2 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. He added that he was taken into custody on suspicion and that he had not committed any act as alleged by the prosecution.

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 trial court, impressed by the evidence of PWs 1 and 2 and also the entries in the contemporaneous document namely, Ext.P2 drawn up by PW2 and the further fact that the articles and the accused were promptly produced before court, came to the conclusion that prosecution has succeeded in establishing the case against

the accused and therefore, convicted and sentenced him as already mentioned.

9. Assailing the conviction, the learned counsel appearing for the appellant contended that the court below has omitted to note the infirmities in sampling the articles and that vitiates the proceedings. According to the learned counsel, even going by the prosecution evidence as it now stands, sample was taken only from the can and not from the bottle. So, there is no evidence to show that the bottle contained arrack. It was further pointed out that in Ext.P2 mahazar, the narration was that 200ml of sample was taken in a bottle of 375ml capacity, while at the time of evidence, PW2 says that the sample was taken in a bottle of 200ml capacity. The evidence of PW3 has also been not considered by the court below so says the counsel for the appellant. It was also contended that going by Ext.P9, the Chemical Analysis Report, the percentage of Ethyl Alcohol shown is 37.17 and there is nothing to show that it was arrack. At

any rate, according to the learned counsel, the sentence imposed is extremely severe and not warranted by the facts of the case. It is not in proportionate to the offence committed by the accused.

10. The learned Public Prosecutor on the other hand tried to sustain the conviction and sentence. It was contended on behalf of the State that it is true that there are some minor inconsistencies in the evidence of PWs 1 and 2, but that is only natural for, the witnesses were giving evidence after a long time and it will be imprudent on the part of the court to insist for mathematical precision or for a photographic memory. What the court has to see is whether, when the evidence is read as a whole, it inspires confident in the mind of court. Equally so, according to the learned Public Prosecutor, is the rule regarding corroboration. The prosecution had examined PW3, who admitted his signature on the document but denied having seen the incident. If as a matter of fact, the evidence of PWs

1 and 2 are acceptable, then the mere fact that there is no independent corroboration, is not a ground to reject their evidence. The learned Public Prosecutor cautioned this Court that it is not as if the evidence of PWs 1 and 2 alone are available, in fact, Ext.P2, the contemporaneous document narrates the entire details and the production of the accused with the articles promptly further strengthens the prosecution case. The defect pointed out regarding sampling has no consequence for the simple reason according to the learned Public Prosecutor, any quantity be it little or small constitute an offence. Even assuming that the contents of the bottle is ignored and the sample is taken only from the can, still as long as it is proved that the can contained arrack, the accused cannot escape. Relying on the decision reported in **Asokan v. State of Kerala** (1998 (1) KLT 330), the learned Public Prosecutor pointed out that the percentage of Ethyl Alcohol has no bearing on the issue involved in the case. In short, the contention is that there

are no grounds made out to interfere with the findings of the court below.

11. The substantial evidence regarding the detection, seizure, sampling etc., are furnished by PWs 1 and 2 among whom PW1 was the Preventive Officer attached to the Excise Enforcement and Narcotic Special Squad, Malappuram under whose leadership, the patrol party went out for patrolling on 07.06.2002 also. PW2 was with him. He too was the Preventive Officer. A reading of their evidence shows that they gave a consistent version regarding the location of the place of incident, the identification of the accused and the seizure etc.. Of course, PW1 would say that he took sample from the can in a bottle of 200ml capacity with 200ml in it. However, the records show that the sample bottle was of 375ml capacity. But this slight inconsistency may be a clerical mistake or may be by an oversight. The fact remains that sample was taken. Both of them say that they happened to see the accused coming along with a bag and

when the bag was examined, it was found to contain a can of 5 litres capacity and a bottle of 2 litres capacity. They say that by taste and smell they recognized the liquid in the can and the bottle as arrack. Both of them give a consistent version regarding the arrest, sampling, preparation of mahazar etc.. Even though they were cross examined at length, nothing touching upon the veracity of their evidence could be brought out in their cross examination. It is significant to notice that no suggestion is made to PWs 1 and 2 that they had any ill-motive or they had any axe to grind against the accused.

12. Coming now to the issue regarding sampling, as rightly pointed out by the learned Public Prosecutor, it may not have much of a significance in the case on hand. Going by the prosecution version, the accused had can with him of 5 litres capacity in which there was two litres of arrack and there was bottle of two litres capacity having 1 ½ litres of arrack. Assuming and accepting the argument advanced by

the learned counsel for the appellant that the sample was taken only from the can and not from the bottle, it is difficult to understand how it can be of any help to the accused. Even a very small quantity of possession of arrack is an offence. The quantity may have some relevance in the context when we consider the issue regarding Indian Made Foreign Liquor where a person is entitled as per law to keep a certain quantity of the same. There is no such provision as far as the arrack is concerned. So, the fact that no sample was taken from the bottle does not come to the aid of the accused. Further, PW1 has taken enough precaution to state that contents of both can and bottle were exactly similar and so he did not feel it necessary to take a separate sample from the bottle. He is perfectly justified in doing so.

13. PW3, the independent witness did not support the prosecution except for the fact that he admitted his signature on the document. He would say that he signed the document in the Excise Office at Nilambur. But that can

be taken only with a pinch of salt. Of course, it may look odd when the prosecution says that late in the night on 07.06.2002, when the accused was located, they could also find two independent witnesses. Whatever that be, as already noticed, there is nothing to show that the Excise Officials namely, PWs 1 and 2 had any reason to fabricate a case against the accused.

14. The contention based on the percentage of Ethyl Alcohol, as rightly contended by the learned Public Prosecutor, does not deserve consideration in the light of the decision cited by the learned Public Prosecutor. In the said case, an identical question was considered and it was held that the definition of arrack is clear enough and there is no ambiguity in that regard and one need not labour much about the percentage of Ethyl Alcohol present in the sample analyzed. That contention too has to fail.

15. Then as rightly noticed by the learned Public Prosecutor, the prompt production of the accused, the

documents and the articles before court lends further credence to the prosecution case.

16. It was the above facts and circumstances which led the court below to come to the conclusion that the offence has been made out. It could not be said that the finding of the court below is perverse or contrary to the evidence on record. If that be so, interference is not warranted. The conviction for the offence under Section 8(1) has only to stand.

17. Faced with the above situation, the learned counsel appearing for the appellant pointed out that the sentence needs interference for, it is totally disproportionate to the offence committed and the passage of nearly 14 years must have some bearing on the sentence to be imposed. It is also pointed out that the quantity seized from the possession of the accused is not so large so as to warrant such a severe sentence. Considering the fact that nearly 14 years have elapsed and things might have

quietened down and accused might have settled down, the learned counsel prays that maximum leniency be shown with regard to the sentence.

18. Of course, the offence is made out and it cannot be said that it can be taken lightly. But the fact also remains that the sentence has to be proportionate to the offence committed and the passage of time and various things that might have happened in between must receive consideration at the hands of the court in deciding the question of sentence. Any how, there is no material before this Court to show either prior to or subsequent to the incident in question, the accused has indulged in any such act.

19. While sentence should be imposed, it should not be too severe or disproportionate to the offence committed by the accused. It is also to be borne in mind that he must be given an opportunity to reform himself.

Considering the totality of the circumstances, while confirming the conviction of the accused for the offence punishable under Section 8(1) of the Abkari Act, the sentence imposed by the court below is set aside and considering the passage of time and age now attained by the accused, he is sentenced to suffer simple imprisonment for a period of one month and to pay a fine of ₹1 lakh, with a default clause of two months. Set off as per law will be allowed.

Sd/-
P.BHAVADASAN
JUDGE

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P.A. to Judge