

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 29TH DAY OF OCTOBER 2015/7TH KARTHIKA, 1937

CRL.A.No. 399 of 2006 ()

**AGAINST THE JUDGMENT IN SC 832/2004 of ADDITIONAL SESSIONS COURT
(ADHOC-I), KASARAGOD DATED 17-01-2006**

**IN CP 196/2004 OF JUDICIAL FIRST CLASS MAGISTRATE, KASARAGOD
DATED 30-09-2004**

APPELLANT(S)/ACCUSED:

- 1. M.ANEESH KUMAR, S/O.KUNHIKRISHNAN,
A.B.HOUSE, ADUKATHBAYAL, MAILATTY
BARA VILLAGE.**
- 2. A.M.RAMACHANDRAN, S/O.P.MUTHU NAIR,
AVALINKAL HOUSE, KOLATHUR,
KOLATHUR.**
- 3. C.ARUN KUMAR, S/O.RAGHAVAN,
CHATTAMCHAL HOUSE, BEHIND CHATTAMCHAL, TREASURY
THEKKIL VILLAGE.**

BY ADV. SRI.T.B.SHAJIMON

RESPONDENT(S)/COMPLAINANT:

**STATE OF KERALA, REP. BY THE
S.H.O., KASARAGOD POLICE STATION
WHO IS REPRESENTED BEFORE THIS HON'BLE COURT
BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA
ERNAKULAM.**

BY PUBLIC PROSECUTOR SMT. S. HYMA

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 29-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 399 of 2006

Dated this the 29th day of October, 2015

J U D G M E N T

Accused Nos. 1 to 3 were prosecuted for the offence punishable under Section 55(a) of the Abkari Act and were found guilty. They were therefore convicted and sentenced to undergo rigorous imprisonment for six months and to pay a fine of ₹1 lakh with a default clause of one month.

2. The incident in this case occurred on 02.03.2003. Among the three accused, the first accused was driving an autorikshaw and the other two accused were travelling in the same. PW3, the Additional Sub Inspector of Police, Kasaragod along with PW1 and others were checking vehicles that were passing by along the Chatanchal-Koliyadukam road. They happened to see the auto driven by the first accused coming along and signalled it to stop. The vehicle came to a halt a little ahead and then it is alleged that the driver and the two passengers tried to run away

from the place. They were successfully prevented from doing so and they were apprehended. On inspection of the autorikshaw, it is stated that from the platform on the rear side, 250 packets, each of 100ml of Karnataka Made arrack were seized. The accused were arrested from the spot. PW3 opened three of the packets and emptied the contents into three bottles and sealed and labelled the same. The label contained the signatures of PW3, the accused and the independent witnesses. The balance packets were put in the sack itself and sealed and labelled as was done in the case of sample. Ext.P1 is mahazar prepared on the spot. They reached the Station along with the accused and contraband article and PW3 would say that he registered crime as per Ext.P2 FIR. He identified the packets as MO1 series, the empty packets as MO2 series and the sack as MO3. PW4 was the Sub Inspector of Police, Kasaragod Police Station at the relevant time. On 03.03.2003 he took over the investigation of the case. He went to the place of

occurrence and prepared Ext.P4 scene mahazar. He prepared Ext.P5 property list and recorded the statements of witnesses. On 4.3.2003 he claims to have sent the articles to the court along with the forwarding note namely, Ext.P6. He obtained the Chemical Analysis Report Ext.P7. The investigation was completed and charge was laid by CW10.

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, Kasaragod under Section 209 of Cr.P.C. after following the necessary procedures. The said court made over the case to Additional Sessions Court, (Ad hoc - I), Kasaragod, 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 55(a) 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 4 examined and had Exts.P1 to P7 marked. MOs 1 to 3 were got identified and marked.

6. After the close of prosecution evidence, the accused were questioned under Section 313 Cr.P.C. They denied all the incriminating circumstances brought out in evidence against them and maintained that they are innocent. The first accused stated that the 3rd accused had bought the autorikshaw from one Ibrahim. In that agreement, he and the second accused were witnesses. Since the entire money for the transaction was not given, on a complaint by Ibrahim, all the three of them were called to the Police Station. They were asked to take the vehicle also to the station. The RC book stood in the name of Ibrahim. That was seized by the Police. The first accused says that the accused were asked to take the vehicle after they had paid the entire amount to Ibrahim. Two days thereafter,

they were again called to the Station and they were falsely implicated in the case. A2 and A3 also supported A1.

7. Finding that they could not be acquitted under Section 232 Cr.P.C., they were asked to enter on their defence. They chose to adduce no evidence.

8. The court below found the evidence of PWs 1 and 3 taken along with the contemporaneous document namely, Ext.P2 and also the Chemical Analysis Report, Ext.P7 came to the conclusion that the evidence adduced by the prosecution is sufficient and established beyond reasonable doubt the involvement of the accused in the crime and accordingly, found them guilty. Conviction and sentence as already mentioned followed.

9. Assailing the conviction, the learned counsel appearing for the appellant contended that in the case on hand, all that the prosecution has is the interested version of the Detecting Officer and the companion officer who accompanied him and there is no independent evidence to

corroborate their version and it will be extremely dangerous to base a conviction based solely on the testimony furnished by the Police Officer. Even according to the prosecution, there was only one independent witness and he was not examined. That is this want for compliance with the statutory requirements and it is also pointed out that the evidence of PWs 1 and 3 though would appear to be consistent, cannot be the basis for conviction as they are Police Officers and their evidence is left without corroboration. The learned counsel for the appellant pointed out that the articles were produced before court only on 04.03.2003, where the detection of the offence was on 02.03.2003. The delay has not been explained and that is fatal to the prosecution. Hence, accused are entitled to an acquittal.

10. The learned Public Prosecutor on the other hand contended that the evidence of PWs 1 and 3 taken along with the mahazar prepared by PW3 at the spot contains all

the details and it could not therefore be said that there was any manipulation of records or documents or that the case has been fabricated and the accused have been falsely implicated. The delay of one day in producing the documents has been properly explained by PW4 and no prejudice has been caused to the accused even assuming there is a delay of one day. It must be remembered according to the learned Public Prosecutor that the detection was late in the night of 02.03.2003 and the articles etc. were produced on 04.03.2003 itself. There is no rule of law that the evidence of Police Officers cannot be accepted even if they are found to be credit worthy for want of corroboration. In the case on hand, there is no suggestion to PWs 1 and 3 that they had any ill motive to falsely implicate the accused. Accordingly, the learned Public Prosecutor contended that the court below which on analysis of evidence concluded that the offence has been made out does not call for any interference.

11. As rightly pointed out by both the learned counsel for the appellant and the learned Public Prosecutor, the evidence of detection and the drawing up of Ext.P1 mahazar remains confined to the testimony furnished by PWs 1 and 3. It is no doubt true that PW1 is the Police Constable and PW3 is the Sub Inspector of Police of the Kasaragod Police Station. They are both Police Officers. Both of them say that they were checking vehicles on the relevant date and they happened to see the autorikshaw in question coming along the road. They say that it was signalled to be stopped. The auto came to a halt a little ahead and the driver and two person who were travelling in the auto tried to escape. They also say that in spite of the effort made by the accused to escape, they were apprehended by the Officers. PW3 says about the sampling done by him and affixure of seal on the sample. This version of PW3 gains support from PW1 also. Both of them say that all the three were arrested from the spot itself and Ext.P3 is the arrest memo. Even though PWs

1 and 3 were cross examined at length, there is no contradiction brought out in their evidence nor is there any inconsistency established. The consistent and uniform version given by PWs 1 and 3 and also the narration of the facts as contained in Ext.P1, seizure mahazar which is contemporaneous document, clearly show that accused were carrying contraband article.

12. PW4 is the Investigating Officer. He speaks about having prepared the scene mahazar and also produced the documents before court on 04.03.2003.

13. It is not as if that the prosecution did not attempt to adduce independent evidence. CW6 is the person who is said to be the independent witness who according to PWs 1 and 3 had signed the mahazar and had witnessed the seizure. The proceedings of the court show that in spite of coercive steps initiated by the court, his presence could not be procured. Therefore, forming the opinion that his presence could not be procured within a reasonable time,

the court dispensed with his examination. Therefore, it could not be said that there was no attempt on the part of the prosecution to adduce independent witness.

14. Even otherwise once it is found that the evidence of PWs 1 and 3 is convincing enough, the mere fact that there is no independent evidence, does not assume much significance. There is no rule of law that the evidence given by Police Officers will have to be corroborated by independent evidence. As already noticed, there is no suggestion to PWs 1 and 3 that they had falsely implicated the accused even though in the 313 statement given by the accused, it is stated so.

15. It was contended by the learned counsel for the appellant that there is nothing to show that the article seized was arrack. The Chemical Analysis Report only makes mention of the percentage of the ethyl alcohol contained in the sample sent for examination. The question as to the specification of the strength of liquor and also the

question as to whether the non fixation of the standard as per the Rules is fatal, was considered in the decision reported in **Asokan v. State of Kerala** (1998 (1) KLT 330) wherein, it was held as follows:

“40. The next contention is whether the definition of ‘arrack’ is vague and arbitrary and, therefore, the penalty proposed under S. 8(2) is also arbitrary and unconstitutional ? ‘Arrack’ is defined in S. 3(6A) as follows:

“Arrack means any potable liquor other than Toddy, Beer, Spirits of Wine, Wine, Indian made spirit, foreign liquor and any medicinal preparation containing alcohol manufactured according to a formula prescribed in a pharmacopoeia approved by the Government of India or the Government of Kerala, or manufactured according to a formula approved by the Government of Kerala in respect of patent and proprietary preparations or approved as a bona fide medicinal preparation by the Expert Committee approved under S. 68A of the Act”.

The contention raised on behalf of the petitioners is that the definition of arrack under the Kerala Abkari Shops (Disposal in Auction) Rules 1974 as it stood earlier means spirit manufactured from molasses or from jaggerry in any approved distilleries in India not coloured or flavoured and reduced to 25° UP (under proof). Again R. 2 of the Foreign Liquor

Rules as it stood earlier, provided that the minimum strength at which imported and Indian made Foreign Liquor can be sold at 35° UP for minimum 25° UP for all other kinds of spirits. So also in the case of coconut toddy arrack which was coloured, flavoured and bottled in the licensed distilleries in the State shall also conform to the minimum of 25° UP. Now, no such standard has been either fixed by the Act or the Rules in the case of the so-called arrack for which there is now the new penal provision. The term has to be defined in positive terms as to what arrack is and what it should be. The citizen has got a right to know what exactly the prohibited act constitutes as an offence. So creating of an offence with vagueness is illegal, arbitrary and unconstitutional for its vagueness and uncertainty. According to the petitioners, a minimum strength ought to have been prescribed for arrack in order to make its possession or manufacture penal. We cannot accept such a contention. Legislature in its wisdom has defined 'arrack' as a potable liquor other than toddy, beer, etc. The intention of the Legislature appears to be to prohibit arrack of any strength. Hence, it cannot be said that the definition of arrack is vague, since no

minimum strength is prescribed. An enactment is void for vagueness if its prohibition is not defined - See *Kartar Singh v. State of Punjab* - (1994) 3 SCC 569. In that case the Supreme Court was dealing with the definition of 'abet' in S. 2(1)(a)(i) of the Terrorist and Disruptive Activities (Prevention) Act S. 2(1)(a)(i) is as follows:

"2(1). In this Act, unless the context otherwise requires:-

(a) 'abet' with its grammatical variations and cognate expressions, includes -

(i) the communication or association with any person or class of persons who is engaged in assisting in any manner terrorists or disruptionists".

The argument before the Supreme Court was that even a person who is entirely innocent of any terrorist or disruptive activity may be punished. In paragraph 128 of the judgment, the Supreme Court observed as follows:-

"Therefore, when the substantive provisions of the Act expressly require the intention as an essential ingredient to constitute an offence, can it be said that the ingredient of definition should be excluded on the part of the abettor who abets those substantive offences. In other words, can it be said that the abettor has abetted the substantive of fence without any guilty mind (means rea) or without actual knowledge as to what would be the consequence of his designed Act".

Finally the Court held that the abettor should be shown to have actual knowledge or to have reason to believe that the person or class of persons with whom he is charged to have communicated or associated is engaged in assisting in any manner the terrorists and disruptionists. After considering the arguments of the parties and in the light of the decision in *Kartar Singh's* case, we do not find any vagueness in S. 3(6A) which defines 'arrack'. Hence, we do not find any merits in the contention urged under Point No. (3) and the same is rejected."

16. The court below had analysed the evidence in considerable detail and found the evidence of PWs 1 and 3 to be convincing enough considered in the light of the documentary evidence produced by the prosecution. It could not be said that the finding is perverse or is contrary to the evidence on record. Its finding seems to be fully justified. Hence, the conviction has only to stand.

17. Faced with the above situation, the learned counsel for the appellant contended that all the three

accused were of young age and they should be given some opportunity to correct themselves and the imposition of six months imprisonment is too severe punishment considering the nature of offence said to have been committed by the accused persons and also considering the quantity of the article seized. Ten years have elapsed and to sustain the sentence as such may not be fully justified.

18. It must be said that the passage of time has some bearing on the sentence. Even otherwise, considering the age of the accused persons and also the fact that the quantum seized is not considerable, it is felt that the sentence of six months imprisonment awarded by the court below is too severe and it is disproportionate to the offence said to have been committed by the accused.

19. For the above reasons, while upholding the conviction, the sentence awarded by the court below is set aside and it is held that each of the accused is sentenced to undergo simple imprisonment for a period of one month and

to pay a fine of ₹1 lakh in default of payment of which he is to suffer simple imprisonment for a period of one month. Set off as per law will be allowed.

With the above modification in the sentence, this appeal is disposed of.

Sd/-
P.BHAVADASAN
JUDGE

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P.A. to Judge