

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 8TH DAY OF OCTOBER 2015/16TH ASWINA, 1937

CRL.A.No. 410 of 2006

AGAINST THE JUDGMENT IN SC 162/2005 of ADDL.SESIONS COURT
(ADHOC)-II, THODUPUZHA .

APPELLANT(S)/ACUSED NO.1 .:

KAREEM, S/O.SULAIMAN, PANAPPARAMBIL HOUSE,
PRAKASH KARA, UPPUTHODU VILLAGE.

BY ADVS. SRI.C.M.TOMY
SRI.MATHEW SKARIA

RESPONDENT(S)/COMPLAINANT...:

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

BY PUBLIC PROSECUTOR SRI. C.K. JAYAKUMAR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
08-10-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 410 of 2006

Dated this the 8th day of October, 2015.

JUDGMENT

The accused was prosecuted for the offence punishable under Section 8(2) of the Abkari Act. He was found guilty and therefore convicted and sentenced to undergo rigorous imprisonment for six months and to pay fine of Rs.1,00,000/-, in default, to undergo rigorous imprisonment for three months.

2. P.W.5, the then Sub Inspector of Police, Murickassery Police Station on 18.07.2003 had gone out on patrol duty. At about 7.25 p.m. when they reached a place called Prakas, he got reliable information that at Karikkinmedu a person was engaged in vending in illicit liquor. He reached the place and happened to see a person holding a black can and a glass. He was approached and when he tried to escape,

he was intercepted. Contents of the can was examined and by taste and smell it was found to be arrack. The quantity was about 750 ml. The accused was arrested. 180 ml. was taken as sample in a bottle. It was sealed and labelled. Ext.P2 mahazar was prepared. P.W.5 and P.W.1, the Constable, returned to the police station along with the accused, the contraband articles and records and registered Crime No. 87 of 2003 as per Ext.P4 FIR. Property list was prepared by him as Ext.P5 and forwarding note is Ext.P6. He had the articles and the accused produced before the court on the next day. Investigation was done by P.W.2, who verified the records, obtained chemical analysis report Ext.P1 and laid charge before court.

3. The court, before which final report was laid took cognizance of the offence. Finding that the case is one exclusively triable by a court of Sessions, committed the case to Sessions Court, Idukki. The said court made over the case

to Additional Sessions Court (Adhoc)-II, Thodupuzha for trial and disposal.

4. The latter court, on receipt of records and on appearance of the accused framed charge for the offences punishable under Sections 8(1) and (2) 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 5 examined and had Exts.P1 to P6 marked. M.Os. 1 to 3 were got identified and marked. After the close of the prosecution evidence, the accused was questioned under Section 313 Cr.P.C., in which he denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent. 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.

5. Presumably going by the evidence of P.Ws.1 and 5 and also relying on Exts. P1 and P2, the court below formed

the opinion that the prosecution has succeeded in establishing case against the accused and conviction and sentence as already mentioned followed. The said conviction and sentence are assailed in this appeal.

6. Assailing the conviction and sentence, learned counsel for the appellant contended that chemical analysis report is not at all helpful in determining whether the article seized is arrack or not. The query in the forwarding note regarding the nature of the article has not been answered. Learned counsel referred to the Kerala Rectified Spirit Rules and also brought to the notice of this Court the definition of 'alcohol' contained in Rule 2(b) of the said Rules. It was then contended that therefore unless the Laboratory specifically answers the nature of the article, a conviction could not be entered into. It was then contended that there is violation of Section 53 of the Abkari Act and that is fatal.

7. Learned counsel also contended that the court below was not justified in placing implicit faith on the evidence of P.Ws. 1 and 5 and the contemporaneous documents to convict the accused. Considering the quantity seized, the sentence awarded is very harsh and severe.

8. Learned Public Prosecutor on the other hand contended that none of the contentions have any basis whatsoever. The definition of 'alcohol' referred to by the learned counsel for the appellant is for the purpose of Section 29 of the Act. In order to constitute arrack, any strength of ethyl alcohol is required was considered in the decision reported in *Asokan v. State of Kerala* (1998(1) K.L.T. 330). Referring to Section 53 of the Act, learned Public Prosecutor pointed out that the said Section has no application to the facts of the case for the simple reason that that Section was necessary in a situation where the Excise officers could not file

the final report and the final report could be filed only through a Station House Officer. The position is covered by Section 50 of the Act which enables the excise officers to file a report under Section 173(2) Cr.P.C. It is not therefore necessary that two seals shall be affixed as mentioned in Section 53 of the Act.

9. After having heard learned counsel for the appellant and learned Public Prosecutor, and having perused the records, it appears that no grounds are made out to interfere with the findings of the court below. The evidence of P.Ws. 1 and 5 is clear to the effect that on the date of occurrence P.W.5 along with P.W.1 had gone on patrol duty and they happened to see the accused having a can with him. P.Ws. 1 and 5 gave a uniform and consistent version regarding the incident. Both of them say about the seizure of can and seizure of arrack in the possession of the accused. They say that they recognized the contraband article by smell and taste.

They also say about having arrested the accused and having prepared Ext.P2 mahazar, arrest memo, Ext.P5 property list and forwarding note.

10. P.W.3 is an independent witness. He identified his signature on Ext.P2 mahazar. Of course, he denied having actually seen the seizure from the accused. He also identified his signature on M.O.1 label.

11. P.W.4 is also an independent witness who admitted his signature on Ext.P2. He is a social worker. He says that on seeing a crowd, he went to the place and he found the accused standing there and police officers. He denied having actually seen the seizure of the contraband article.

12. It is not the law that the evidence of police officers have to be viewed with suspicion. If their evidence is found to be convincing and cogent enough, there is no harm in entering a convicting on that basis. In the case on hand,

the evidence of P.Ws. 1 and 5 are consistent and uniform and that is considerably supported by Exts. P1 and P2. Prompt production of the articles, the accused and the documents before court further gives credit to the prosecution case and that makes the prosecution case more probable. There is no suggestion to P.Ws. 1 and 5 that they have any oblique motive or ill-will towards the accused to falsely implicate him. On facts therefore, the finding of the court below calls for no interference.

13. Coming to the two questions raised by the learned counsel, first of which has no legs to stand in the light of the definition of 'arrack' contained in the Act which reads as follows:

“3(6A) “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.”

14. In order to ascertain whether the article is arrack or not, learned counsel relied on the decision reported in *Asokan v. State of Kerala* (1998(1) K.L.T. 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 offence without any guilty mind (mens 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.”

15. In the light of the interpretation given by this Court and keeping in view the object and purpose of the interpretation of the new provision, this contention raised by the learned counsel for the appellant is not worthy of

consideration at all.

16. Equally without basis is the contention raised on the basis of Section 53 of the Abkari Act. Learned counsel contended that P.W.5 should have affixed his seal at the place of occurrence and after coming back the SHO he has gone ahead. As rightly pointed out by the learned Public Prosecutor the affixing of two seals is in a situation where the officer concerned could not file final report and final report could be filed through the police. In such cases, the articles will be produced before the police station concerned and sample being taken from the police station. In such situation, it was insisted that apart from the excise officer, the SHO who was in custody of the article should affix seal. That has no relevance to the facts of the present case. Both the contentions are therefore only to be rejected.

17. Faced with the above situation, learned counsel for the appellant contended that sentence seems to be on the

harsh side and some leniency may be shown in that regard. Learned counsel invited the attention of this court to the quantity of article seized.

18. There seems to be some substance in the above contention. Considering the quantity of article seized from the possession of the accused, six months rigorous imprisonment is certainly on the high side.

19. It is seen from the records of the case that the accused was in custody from 18.7.2003 to 8.8.2003 and from 6.6.2005 to 21.6.2005. He had been in custody for nearly a month. Considering the various facts and circumstances of the case, it is felt that sentence needs to be interfered with.

Thus, while upholding the conviction under Section 8(2) of the Abkari Act, the sentence awarded by the trial court is set aside and the sentence shall stand confined to the period of imprisonment undergone by the accused and it is ordered that he is liable to pay Rs,1,00,000/- as fine and in

default, he shall suffer simple imprisonment for one month.

This appeal is disposed of as above.

P. BHAVADASAN,
JUDGE

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