

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 28TH DAY OF OCTOBER 2015/6TH KARTHIKA, 1937

CRL.A.No. 433 of 2006

AGAINST THE JUDGMENT IN SC 113/2004 of ADDL. SESSIONS
COURT/SPL. COURT FOR NDPS ACT CASES, THODUPUZHA.

APPELLANT(S)/ACCUSED:

MATHEW, AGED 36, S/O.MICHAEL,
CHIRACKAL HOUSE, KANCHIYARKARA,
AYYAPPANCOIL VILLAGE.

BY ADV. SRI.S.GOPAKUMARAN NAIR (SR.)

RESPONDENT(S)/COMPLAINANT:

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

BY PUBLIC PROSECUTOR SMT. MADHUBEN.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
28-10-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 433 of 2006

Dated this the 28th day of October, 2015.

JUDGMENT

The accused was prosecuted for the offences punishable under Sections 55(a)(i) and 8(1) of the Abkari Act and he was found guilty. He was therefore convicted and sentenced to undergo simple imprisonment for two years and to pay fine of Rs.1,00,000/–, in default, to undergo simple imprisonment for one year for the offence under Section 55(a) of the Abkari Act. He was acquitted of the charges under Section 55(i) of the Kerala Abkari Act. Set off as per law was allowed.

2. The incident which gave rise to the case is said to have occurred on 1.7.2001. On that day, P.W.6, who was the Additional Sub Inspector attached to Kattappana police station, along with P.W.3 and other officers had gone on law and order patrol duty. When they reached Pallikkavala, they got reliable information that arrack was being sold in the

house of the accused. P.W.6 claims that he prepared a search memo and sent it to court which is marked as Ext.P5. He along with two independent witnesses reached the house in question and it is said that out of the two persons who were sitting in the sit out of the house, one person ran away from the place. The house was searched. When the kitchen of the house was searched, P.Ws.3 and 6 found 37 packets of 100 ml. each kept under a desk in a white plastic packet. One of the packets was opened and by smell and taste the liquid was identified as arrack. P.W.6 took sample in a bottle of 180 ml capacity and sealed and labelled the same. Two other packets were also taken as samples. The rest of the packets were seized, sealed and labelled. The labels on both the samples as well as in the balance contraband article had the signature of the witnesses and P.W.6. P.W.6 prepared Ext.P1 mahazar P.W.6 along with P.W.3 and other officers returned to the police station with the article seized from the place of occurrence and the documents prepared by them and P.W.6

registered Crime No. 349 of 2001 for offence under Section 55 (a) (i) and Section 8(1) and (2) of the Abkari Act as per Ext.P6 FIR. He prepared the property list Ext.P7. P.W.6 claims to have been in custody of the articles since they were produced before court.

3. Investigation was taken over by P.W.4 who claims to have arrested the accused on 2.9.2001. He prepared Ext.P4 forwarding note and sent it to court. He completed investigation and 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, Thoduuzha. The said court made over the case to Additional Sessions Court – Special Court for NDPS Act Cases, 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)(i) and 8(1) 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 7 examined and had Exts.P1 to P9 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. He denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent. He denied that building No. VI/3 of Kanchiyoor Panchayat belonged to him. The number of his building is II/8. Finding that the accused could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. He had D.W.1 examined.

5. Presumably considerably influenced by the evidence of P.Ws.3 and 6 and also Ext.P1 mahazar and the prompt production of the articles and the documents before court, the court below was inclined to hold that the prosecution had established the case beyond reasonable

doubt and held the accused guilty. Conviction and sentence as already mentioned followed.

6. Shri. S. Gopakumaran Nair, learned Senior Counsel appearing for the appellant assailed the conviction on several grounds. It was pointed out that the accused was not arrested from the spot and there is no identifying features relating to the accused in any of the documents produced by the prosecution and it is not known as to how it is concluded by the Investigating Officer that the accused is the person who ran away from the house. Learned counsel then pointed out that two independent witnesses, P.Ws. 1 and 2, turned hostile to the prosecution and therefore the prosecution is left with no corroborative items of evidence and they have to solely rely on the testimony of P.Ws. 5 and 6 who are the police officers among them P.W.6 is the detecting officer and P.W.3 had accompanied him on patrol duty. Learned counsel drew the attention of this Court to the evidence of P.Ws. 3 and 6 in court and pointed out that they did not identify the

accused in court as the person who ran away from the spot and there is no proper identification of the accused before court.

7. There is also reliable and acceptable evidence to show that the house from which the contraband article was seized belonged to the accused since Ext.P9 can serve no purpose, according to the learned Senior Counsel, as that was based on a temporary census assessment made by the concerned authority. The evidence of P.W.7 was referred to and it is pointed out that even according to him the authentic document is the assessment register. It is not stated by P.W.7 that Ext.P9 is based on the assessment register and therefore Ext.P9 can serve no purpose in the case. These infirmities have been overlooked by the lower court and even though they are significant and of considerable relevance since it relates to the identity of the person who is said to have possessed the article seized from the place and who ran away from the place where it was recovered. The reasons given by the court below

to overrule these two objections raised by the accused are not sustainable. At any rate, according to the learned counsel, the accused is entitled to benefit of doubt and he is entitled to an acquittal.

8. Learned Public Prosecutor tried to sustain the conviction by pointing out that the evidence of P.Ws. 3 and 6 are sufficient in law to show that there was search and seizure as alleged by the prosecution. It is not the law that the evidence of police officers should be viewed with suspicion and when it is found to be unblemished it is not necessary that the court should look for corroboration. Learned Public Prosecutor also pointed out that Ext.P1 which is the contemporaneous document prepared by P.W.6 narrates the acts done by the officers in detail and it cannot be said that it is a manipulated document. Learned Public Prosecutor also pointed out that wife and father-in-law of the accused were in the house and that would show that the house belongs to the accused. In short, Learned Public Prosecutor contended

that none of the grounds taken by the learned Senior Counsel for the appellant is sustainable in law and the conviction has only to stand.

9. The evidence of search, detection and seizure is confined to the testimony of P.Ws. 3 and 6. P.W.6 at the relevant time was the Additional Sub Inspector of Kattappana Police Station. He along with P.W.3, the Head Constable of the Station and other officers were on law and order duty and when they reached Pallikkavala, they received reliable information that the accused is carrying on sale of arrack in his house. Both P.Ws. 3 and 6 say that they secured the presence of two independent witnesses namely, P.Ws. 1 and 2 on their way and reached the house of the accused. As soon as they reached the house of the accused, they found that one among the two persons who were sitting on the sit out of the house took to his heels. Both of them gave a uniform and consistent version regarding the detection of the contraband article, its seizure and sampling by P.W.6. Even though they

were cross-examined at length, no inconsistency and contradiction could be brought out in their evidence regarding these aspects.

10. It is not the law that in all cases evidence given by the police officers will have to be corroborated by independent items of evidence. In the case on hand, it is not as if the prosecution did not adduce independent evidence. The prosecution examined P.Ws. 1 and 2. But unfortunately for the prosecution, they refused to support the prosecution case. There is nothing to show that P.Ws. 3 and 6 had any ill-will or oblique motive to falsely implicate the accused. No other reason is given. There was nothing to show that Ext.P1 mahazar was not drawn up as stated by P.W.6.

11. However, the question still remains regarding the identity of the accused and the ownership and possession of the house from where the article was seized. It is conceded by P.Ws. 3 and 6 that they had not mentioned any identifying features of the person who is alleged to have ran away from

the house when they reached the house of the accused. True, P.W.3 does say in court that the accused was seen running away from the house. But in his statement to the Investigating Officer, such a statement is conspicuously absent and what he has stated is that he saw a person running away from the spot. It is surprising to note that P.W.6 does not identify the accused in court. He does not say that the person who is alleged to have run away from the place is the accused present in court. In short, the identity of the accused is not established before court.

12. The court below got over this contingency in paragraph 19 by stating that P.Ws.3 and 6 had stated that wife and father-in-law of the accused were present in the house from where the articles were seized. A reading of the chief examination of P.Ws. 3 and 6 do not indicate that they had stated so before court. It is difficult to understand as to how the court below found that P.Ws. 3 and 6 had stated that the wife and father-in-law of the accused were present in the

house.

13. The prosecution heavily relies on Ext.P9, the certificate said to have been issued by the then Secretary of the Panchayat who is examined as P.W.7. Ext.P9 shows that house No. 3 in Ward VI of Kanchiyar Grama Panchayat when temporarily numbered was shown belonging to the accused.

14. The lower court thought it sufficient to establish the ownership and possession of the house by the accused.

15. However, it is necessary to notice that Exts. P1 and P5 do not contain the number of the house to indicate that the certificate given by P.W.7 relates to the same house from where the contraband article was seized. Further, evidence of P.W.7 is to the effect that the authoritative document regarding the ownership and possession is the assessment register. In short, there is no evidence to show that the house No. 3/6 made mention of in Ext.P9 is the house from where the contraband article was seized and that it does

not find a place in any of the documents produced by the prosecution except in Ext.P9 issued by P.W.7.

16. It is not as if that there was nobody else in the house. Even going by the prosecution, there were other male persons in the house and it is not possible to come to the conclusion on the basis of Ext.P9 that the house was owned and possessed by the accused. Taken along with the fact that neither P.W.3 nor P.W.6 stated that it was the accused who had ran away from the house and in the absence of identification of the accused in court, further makes the prosecution case weak and fragile.

17. The above aspects have been omitted to be noticed by the court below and it cannot be said that they are irrelevant. The identity of the accused as well as the ownership and possession of the premises from where the article was seized has considerable relevance and significance in an offence alleged under the Abkari Act. In the absence of convincing evidence in that regard, the court below based on

conjunctures and surmises found the accused guilty and convicted him.

18. For the above reasons, this Court is unable to uphold the conviction of the accused for the offence under Section 55(a) of the Abkari Act.

19. It is also to be noticed that even on the allegation made by the prosecution, it is extremely doubtful whether the offence under Section 55(a) of the Kerala Abkari Act can be attracted to the case on hand. It is Section 8(1) of the Abkari Act which is attracted to the case on hand. But that does not matter since it has been found that the prosecution has failed to establish the case against 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.