

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. 523 of 2006

AGAINST THE JUDGMENT IN SC 281/2004 of ADDITIONAL sessions
COURT, FAST TRACK NO.I (ADHOC), MANJERI.

APPELLANT(S)/ACCUSED:

BALAN, S/O. KUNHUNNI,
KUTTIPILAYIL HOUSE, KARULAI, NILAMBUR,
MALAPPURAM DISTRICT.

BY ADV. SRI.BABU S. NAIR

RESPONDENT(S)/STATE:

THE STATE OF KERALA, REPRESENTED
BY THE EXCISE INSPECTOR, NILAMBUR
EXCISE RANGE-THROUGH THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM, KOCHI-31.

BY PUBLIC PROSECUTOR SMT. S. HYMA.

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. 523 of 2006

Dated this the 16th day of December, 2015.

JUDGMENT

The accused was put in the dock and prosecuted for the offence punishable under Section 8(i) of the Abkari Act. He was found guilty. He was therefore convicted and sentenced to undergo rigorous imprisonment for three years and to pay fine of Rs.1,00,000/–, in default, to undergo simple imprisonment for one year. Set off as per law was allowed.

2. The incident which gave rise to this case occurred on 1.7.2002. On that day, P.W.1, the Sub Inspector attached to Special Squad, along with his team were on patrol duty in Nilambur area and when they reached the place called Koyppan valavu, they received information about the illegal sale being carried on by the accused. The information received by them was that the accused was vending in liquor near the well in the property belonged to Puthenpurackal

Rajeevan. They reached the place. When they reached the place, they saw the accused pouring liquor from a five litre can to a glass. 2 – 3 persons were sitting around him. Seeing the Excise officers, the persons who were sitting near the accused ran away. Even though accused tried to escape, he could not succeed. On examination of the contents of the glass and the can by smell and taste, they were convinced that it was arrack. The accused was arrested as per Ext.P1 arrest memo. On search of his body a sum of Rs.150/- was recovered, 15 numbers of 10 rupee notes, and it is stated that the accused admitted that it was sale proceeds. At the instance of the accused, another can of 5 litre capacity was also seized. The contents of that can was also identified by taste and smell. From the second can, 200 ml was taken in a bottle having capacity of 375 ml and that sample was sealed. Rest of the contraband articles were also sealed. Labels were affixed on all of them. Mahazar was also prepared at the spot. Ext.P2 is the mahazar prepared at the spot. Thereafter, they returned to the Range Office and handed over the articles to the person

in charge of the office.

3. P.W.6 was functioning as the Excise Inspector of Nilambur and on 2.7.2002 he received the articles and the accused entrusted to the Guard on the previous day. He registered a case on that basis and Ext.P4 is the occurrence report. He prepared the property list and forwarding note as Exts. P8 and P9 respectively and the articles along with the accused were produced before court.

4. P.W.5, the Circle Inspector of Excise Department conducted the investigation. He obtained chemical analysis report, completed investigation and laid charge before court.

5. The court, before which final report was laid, took cognizance of the offence. Finding that the offence is one exclusively triable by a court of Sessions, the said court committed the case to Sessions Court, Manjeri under Section 209 Cr.P.C. after following the necessary procedures. That court made over the case to Additional Sessions Court Fast Track No. I, (Adhoc), Manjeri for trial and disposal.

6. The latter court, on receipt of records and on appearance of the accused, framed charge for the offence punishable under Section 8(i) of the Abkari Act. To the charge, the accused pleaded not guilty and claimed to be tried. The prosecution therefore examined P.Ws.1 to 6 and had Exts.P1 to P9 marked. M.Os. 1 to 4 were got identified and marked. After the close of the prosecution evidence, the accused was questioned under Section 313 Cr.P.C., wherein he denied all the incriminating circumstances brought out in evidence against him and stated that the excise officials had come in search of his son and since they could not apprehend him, he was taken into custody. 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.

7. The court below, considerably influenced and impressed by the evidence of P.Ws. 1 and 2, found the detection to be proper and acceptable taken along with the mahazar and held that there is no reason to doubt the version of the prosecution. Accordingly, the accused was found guilty

and conviction and sentence as already mentioned followed.

8. Learned counsel appearing for the appellant highlighted one aspect prominently. According to the learned counsel, the seal affixed on the sample taken at the place of occurrence by P.W.1 is his personal seal. The forwarding note Ext.P9 is prepared on the next day by P.W.6. The forwarding note contained the seal of P.W.1. That is not possible, according to the learned counsel, because P.W.1 does say that his seal was handed over to P.W.6 and that seal was affixed on Ext.P9. This anomaly remains unexplained by the prosecution. Further, it is pointed out that in the mahazar while it is stated that the incident occurred on the pathway, P.W.1 in cross examination had stated that the incident occurred inside the compound. These anomalies and inconsistencies make the evidence of P.Ws. 1 and 2 extremely vulnerable and it would not be safe to rely on their evidence in the absence of any corroborative evidence to hold the accused guilty. Learned counsel admitted that normally the evidence of official witnesses if are found to be without blemish, that can be

accepted to convict the accused. But in the case on hand, there are certain unexplained situations and therefore their evidence may not be sufficient.

9. Learned Public Prosecutor on the other hand tried to support the finding of the court below by pointing out that the evidence of P.Ws. 1 and 2 is clear and cogent. P.W.1, who was the Sub Inspector in the Special Squad was on patrol duty, got reliable information about the clandestine activity being carried on by the accused. He along with P.W.2 and other officers went to the spot and they had occasion to see the accused actually selling arrack. There is no reason to doubt the version given by P.Ws. 1 and 2 as no ill-motive or oblique motive is shown to be harboured by them to falsely implicate the accused. Of course, the suggestion was that instead of getting the son, father had been taken into custody. That is the only suggestion.

10. Learned Public Prosecutor invited the attention of this Court to the mahazar prepared and pointed out that the simultaneous document prepared contained all the details

which runs well with the oral testimony furnished by P.Ws. 1 and 2. The court below was therefore perfectly justified in accepting the oral testimony of P.Ws. 1 and 2 and relying on Ext.P2 and the chemical analysis report to hold the accused guilty. No grounds are made out to interfere with the said finding.

11. As is usual, the evidence regarding detection remains confined to the evidence of two official witnesses among whom P.W.1 is the Circle Inspector attached to Special Squad and P.W.2 was a Guard. Both of them gave a consistent, cogent and uniform version of the incident. There is no ambiguity in their evidence and there is no inconsistency between their evidence. They speak in one voice. They speak about the information received by them, proceeding to the spot, seeing the accused actually engaging in sale etc. All of them say about seizure of two cans, taking of sample etc. Even though these witnesses were cross examined at length, nothing which affects the credibility of their evidence could be brought out in cross examination.

12. It is true that the independent witnesses examined turned hostile to the prosecution. But there are materials to show that they had signed the documents made mention of by the prosecution even though one of them say that the signature shown is not his signature. But he said that he had signed on a blank paper. But later he admitted that his signature was on a printed paper. Therefore much credence could not be given to the evidence of independent witnesses who had turned hostile at the time of trial. Of course if the evidence of official witnesses is cogent and uniform, there is no harm in accepting their evidence. They may be interested in getting a conviction. But the court does not start with such a presumption, who approaches the evidence with an open mind.

13. It cannot be said that police officers are not competent witnesses. There is no infirmity attached to their evidence. If on analysis of the evidence taken along with the facts and circumstances disclosed by the records, if it is found that their evidence is cogent and convincing and inspires

confidence in the mind of the court, there is no need for the court to insist for corroboration. Corroboration needs to be taken aid of only if substantive evidence suffers from drawbacks.

14. In the case on hand, the evidence of P.Ws. 1 and 2 had already been referred to. Their evidence gets support from Ext.P2. One has to remember that P.Ws. 1 and 2 had given evidence after a long time and it is imprudent on the part of the court to expect photographic memory.

15. It is not as if corroboration is not available from the records. Corroboration if any required is supplied by Ext.P2 mahazar said to have been prepared on the spot. That also goes in tune with the testimony furnished by P.Ws. 1 and 2. If the testimony of P.Ws. 1 and 2 is taken along with Ext. P2, then the court below was inclined to hold against the accused. One can also note that prompt production of the articles before the court goes a long way in establishing the prosecution case. This rules out possibility of any manipulation or fabrication.

16. Learned counsel appearing for the appellant then pointed out that even going by the prosecution version, there were two cans of 5 litre each and sample has been taken from one of them. It is contended that the can from which the liquor was being poured into a glass, sample was not taken from that can. Therefore, it could not be said that the accused was vending in liquor.

17. As far as arrack is concerned, mere possession is sufficient to constitute an offence. Whether sample was taken from the glass or the can which was in the possession of the accused contained contraband article is immaterial. Quantity is also immaterial. Therefore, it does not depend upon the question as to whether sample was taken from M.O.1 or M.O.2. The analysis report shows that sample contained ethyl alcohol, that means the accused was in possession of arrack.

18. Much was argued regarding the seal found on the sample and in the forwarding note. A contention is raised that P.W.1 had detected the offence on 1.7.2002 and

forwarding note Ext.P9 is prepared by P.W.6 on the next day. A question is asked as to how P.W.6 was able to get the seal of P.W.1 to be affixed on the forwarding note. That is a question that should have been asked either to P.W.1 or P.W.6. There can be many explanations for the same. If there was any doubt, it was for the defence to extract answers from the prosecution witnesses. This contention therefore does not merit consideration.

19. It could thus be found that the contentions raised by the learned counsel for the appellant have been considered by the court below and this Court feels that no interference is called for with the findings of the court below that the accused was found in possession of arrack violating Section 8 of the Abkari Act. He was rightly convicted for the said offence.

20. Faced with the above situation, learned counsel for the appellant contended that 14 years have elapsed since the detection of the offence and the accused is quite advanced in age. It will be infact put in the words of learned counsel for

the appellant, cruel to ask him to undergo imprisonment as imposed by the court below. Things would have changed and matters would have undergone several changes. It is to be noticed that there is no history of nefarious activities as far as the accused is concerned and even after being released on bail there is no nefarious activity reported to have been done by the accused. Under such circumstances, learned counsel is fully justified in submitting that a lenient view with regard to the sentence needs to be taken especially for the lapse of time which is too telling upon in the facts and circumstances of the case.

21. Well it must be said that there is some force in the above contention. As rightly pointed out by the learned counsel for the appellant many years have gone by. As to who is to blame for is a different question. Of course, this Court has a role to play. Things might have changed and matters might have been settled. Considering the lapse of time and also the antecedents and subsequent conduct of the accused, it is felt that the sentence imposed is extremely harsh. This is

not to view the offence lightly, but that taking note of the situation, it is felt that a lenient view is warranted.

22. It is felt that the sentence imposed is on the high side and very unfair and it needs interference.

In the result, this appeal is partly allowed and while upholding the conviction of the accused for the offence under Section 8(1) of the Abkari Act, the sentence imposed is set aside and the accused is sentenced to undergo simple imprisonment for a period of one month and to pay fine of Rs.1,00,000/–, in default, to undergo simple imprisonment for one month. Set off as per law will be allowed.

P. BHAVADASAN,
JUDGE

sb.