

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 12TH DAY OF NOVEMBER 2015/21ST KARTHIKA, 1937

CRL.A.No. 557 of 2006

AGAINST THE JUDGMENT IN SC 691/2004 of ADDITIONAL SESSIONS COURT
(ADHOC-1), THODUPUZHA DATED 03-03-2006

APPELLANT/ACCUSED:

THOMAS,
S/O.JOHN, THERUVAKKATTIL VEETIL, KARIMKUNNAM KARA,
KARIMKUNNAM VILLAGE, THODUPUZHA.

BY ADV. SRI.A.C.DEVY

RESPONDENT/STATE:

THE STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM, KOCHI-31.

BY SMT. S. HYMA, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
12-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 557 of 2006

Dated this the 12th day of November, 2015.

JUDGMENT

The first accused in this case along with another accused were prosecuted for the offences punishable under Sections 55(b), 55(i)(i) and 15C of the Abkari Act. During trial, the second accused absconded and the case against him was split up. The first accused alone stood trial and he was found guilty. He was convicted and sentenced to undergo rigorous imprisonment for six months and to pay fine of Rs.1,00,000/–, in default, to undergo simple imprisonment for three months for the offence under Section 55(a) of the Abkari Act.

2. The incident in this case occurred on 18.6.2002. On that day, while P.W.1 was working as Thodupuzha Special Squad Excise Circle Inspector, on getting reliable information, he prepared Ext.P1 search memo, sent it to court, and

conducted raid in the shop run by the first accused. They found a person by name Jinu with a glass which had the smell of alcohol. P.W.1 then found 13 bottles of 750 ml and 100 ml in a bottle having the capacity of 750 ml. from the eastern corner of the inner room and they were able to find arrack in bottles. There were also empty bottles and water present at the site. Ext.P2 search list was prepared and it contains the signatures of the accused, P.W.1 and the witnesses. He prepared Ext.P3 mahazar. He speaks about having sealed and labelled the sample and he claims to have entrusted the articles, the accused and the documents to the Excise Inspector at Thodupuzha. Crime was registered as per Ext.P5. The officer concerned produced the thondi articles before the court immediately. He had the property list prepared and he also prepared the forwarding note with specimen seal and obtained Ext.P7 chemical analysis report. P.W.9 then took over

further investigation. He recorded statements of witnesses, completed investigation and laid charge before court.

3. The court, before which final report was laid, took cognizance of the offences. On finding that the offences are exclusively triable by a court of Sessions, the said court committed the case to Sessions Court, Thodupuzha. The said court made over the case to Additional Sessions Court (Adhoc-I), 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 55(b), 55(i) and 15C 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 9 examined and had Exts.P1 to P9 marked. M.Os. 1 to 6 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. 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. The trial court, mainly based on the evidence of P.Ws. 1 and 2 regarding detection and also the narration contained in Ext.P1 mahazar taken along with the prompt production of the documents and the articles before court, accepted the case of the prosecution and found him guilty.

6. Learned counsel appearing for the appellant contended that except for the statements of P.Ws. 1 and 2, there is hardly any material to fasten liability on the accused. The two independent witnesses turned hostile and there is no independent evidence. It is also contended that without establishing the fact that the first accused is in exclusive

possession or is the owner of the property, he could not have been found guilty. It was then contended that only one sample was taken even though different bottles containing different liquids were seized from the spot. According to the learned counsel, these aspects have been omitted to be noticed by the court below. It is also contended that by no stretch of imagination Sections 55(b) and Section 15C of the Abkari Act can be attracted to the facts of the case. There is hardly any material to show that either the accused was keeping illicit liquor or was manufacturing illicit liquor for sale. The offence under Section 55(a) is entirely different from Section 55(b) and Section 15C. There is nothing in common. According to the learned counsel, the conviction under Section 55(a) of the Abkari Act is bad in law.

7. Learned Public Prosecutor on the other hand contended that evidence of P.Ws. 1 and 2 unerringly point to

the fact that the accused was in possession of the contraband articles. Both P.Ws. 1 and 2 gave a uniform version of the incident and that they happened to come across the accused. They also gave evidence regarding sampling, labelling and the various acts done by the first accused. P.W.1 has also spoken about the entrustment of the articles to the officer in charge.

8. It is not necessary to refer to the evidence of P.W.2 because it is almost on the same tune with the evidence of P.W.1.

9. Any doubt with regard to the testimony of P.Ws. 1 and 2 is set at rest by the contents of Ext.P2 which contains the details of what had transpired at the place of occurrence and the articles seized from the place of occurrence.

10. Learned Public Prosecutor contended that there is no merit in the appeal and it is only to be dismissed.

11. It is to be noticed that the evidence of detection and seizure are confined to the testimony of P.Ws. 1 and 2. They gave a uniform version of the incident. Both of them say about the circumstances under which the crime was detected and regarding the seizure, sampling and labelling. They say that the sample was sealed and labelled. Even though P.Ws. 1 and 2 were cross-examined at length, nothing could be brought out in their evidence. It was not suggested to them that they have any ill-motive to falsely implicate the accused.

12. Coming to the ownership and possession of the room, KP.5/354, from where the contraband was seized, P.W.8 has been examined by the prosecution to show that the room was leased out to the first accused. Even though documents were produced by the prosecution to show that P.W.8 was the owner of the room, no rent receipt has been

produced or agreement of lease is produced.

13. It must be remembered that the police went to the building and recovered the articles from inside the building. It is true that the owner of the building is not present at the site, but accused Nos. 1 and 2 were present. There is no reason to disbelieve the version of the prosecution that the accused was in actual physical possession of the property.

14. It may not be of much relevance in the context of the case to consider the plea that the sample was taken from only one bottle and there is no mention in the mahazar or in the statement of P.Ws. 1 and 2 that the rest of the bottles contained the same liquid.

15. The above argument would have some force in the case of IMFL. In the case on hand, it is illicit arrack. The contemporaneous document and also the property list

produced by the accused before the court gave some credence to the prosecution version. It is the above facts which weighed with the court below to hold the accused guilty. There is no reason to take a different view.

16. However, the charge is one under Sections 55 (b) and 15C of the Abkari Act. It is felt that these two provisions could not be attracted to the facts of the case. The court below convicted the first accused for the offence under Section 55(a) of the Abkari Act. But there is no case for the prosecution that the first accused was in possession of the article in the course of import or export. So Section 55(a) cannot be attracted. However, possession of the contraband article by the first accused falls within Section 8(1) and (2) of the Abkari Act. If that be so, it is an offence. Considering the age of the accused, it is felt that some leniency be shown to the accused.

17. While converting the offence to one under Sections 8(1) and 8(2) of the Abkari Act, the sentence imposed by the trial court is set aside and instead the first accused is sentenced to suffer simple imprisonment for one month and to pay fine of Rs.1,00,000/–, in default, to suffer simple imprisonment for one month. Set off as per law will be allowed.

This Criminal Appeal is disposed of as above.

P. BHAVADASAN,
JUDGE

sb.