

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 17TH DAY OF NOVEMBER 2015/26TH KARTHIKA, 1937

CRL.A.No. 769 of 2006

AGAINST THE JUDGMENT IN SC 206/2005 of II ADDL. SESSIONS COURT,
FAST TRACK - II, PALAKKAD DATED 22-03-2006

APPELLANT/ACCUSED:

VELAPPAN, AGED 55 YEARS,
S/O. KUNHANDI, PULIKUNDU, EZHAKKAD,
MUNDUR, PALAKKAD.

BY ADVS.SRI.P.VIJAYA BHANU
SRI.P.M.RAFIQ

RESPONDENT/COMPLAINANT:

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

BY SMT. S. HYMA, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
17-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 769 of 2006

Dated this the 17th day of November, 2015.

JUDGMENT

The accused in this case was prosecuted for the offence punishable under Section 55(a) and (g) read with Section 8(2) of the Abkari Act. He was found guilty. He was, therefore, convicted and sentenced to undergo rigorous imprisonment for one year and to pay fine of Rs.1,00,000/-, in default, to undergo simple imprisonment for six months for the offence under Section 55(g) read with Section 8(2) of the Abkari Act. He was also sentenced to undergo rigorous imprisonment for one year and to pay fine of Rs.1,00,000/-, in default, to undergo simple imprisonment for six months for the offence under Section 58 read with Section 8(2) of the Abkari Act. The substantive sentences were directed to run concurrently. Set off as per law was allowed.

2. The prosecution case in brief is that on 13.12.2001, while P.W.1 was functioning as the Excise Inspector of Excise Special Squad at Palakkad, at about 9 p.m. along with excise party set out for patrol duty. When they reached Ezhakkad junction, they received reliable information that at a place called Erappayan, a person by name Velappan was keeping illicit liquor in his house. Search memo was prepared and sent to court and thereafter accompanied by two witnesses, they went to the house of the accused. The accused was present there. His house was searched. From the room on the north side, in the north-south corner, two aluminium pots having capacity of 25 lites and from the south-west corner two aluminium pots having capacity of 35 litres containing liquor were found. By taste and smell, it was found to be wash. On search of the kitchen, on the western side two cans having capacity of 5 litre each, an aluminium pot having capacity of 50 litres, a mud pot having capacity of 10 litres and an aluminium vessel having capacity of 15 litres

were found. Aluminium pot. When the cans were examined, it was found that they contained arrack. The accused was arrested from the spot and all the articles were taken into possession. Since wash in all the pots were similar, only one sample, 500 ml in a bottle having the capacity of 750 ml was taken. The arrack contained in the two cans were also similar in nature, a sample of 375 ml was taken as sample and both the sample of wash and sample of arrack were sealed and labelled and the balance was destroyed at the place. P.W.1 prepared mahazar at the place of occurrence. Search memo prepared by him is Ext.P1. Ext.P2 is the search list and the mahazar is Ext.P3. Thereafter P.W.1 claims to have registered Crime No. 29 of 20012 as per Ext.P5 occurrence report.

3. Investigation was done by P.W.7. He prepared scene mahazar which is marked as Ext.P10 and he recorded statements of witnesses. It may be noticed here that the article and the accused were produced before court by P.W.1 on the very next day itself. P.W.7 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, Palakkad under Section 209 Cr.P.C. after following the necessary procedures. That court made over the case to Additional Sessions Court Fast Track No.II, Palakkad 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) and (g) read with Section 8(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 7 examined and had Exts.P1 to P11 marked. M.Os. 1 to 7 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 also stated that on 14.12.2001 at about 8 p.m. excise officials took him to the office and made him to sign certain papers. He stated that he had not committed any offence.

6. 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 found the evidence of P.Ws. 1 and 2 convincing and aided by the contemporaneous records , found the accused guilty. Conviction and sentence as already mentioned followed.

8. Assailing the conviction, learned counsel for the appellant contended that the mahazar does not disclose the nature of seal used by P.W.1 and that is fatal to the prosecution. Evidence of P.W.6 would show that she is the owner of the property. She stated that at the relevant time it was let out to the accused. But strangely enough, P.W.7 , the investigating officer, did not make any enquiry regarding the

same. There is nothing to show that at the relevant time, the property was in the possession of the accused. In fact, the evidence of P.W.6 would show that the agreement showing the rental arrangement was with her which she had shown to the investigating officer. But she says that he refused to look into the same. Whatever that be, according to the learned counsel, the result is that there is nothing to show that the accused is either the owner or in possession of the house in question. Therefore, necessarily, the prosecution has to fail.

9. Learned Public Prosecutor, on the other hand, contended that there is nothing to show that the building belonged to any one else and there is no denial by the accused that it does not belong to him. Evidence of P.Ws. 1 and 2 are sufficient to show that the contraband articles were seized from his possession. The forwarding note contains the specimen seal. The lower court has chosen to accept the evidence and found the accused guilty. It is contended that the conviction and sentence has to stand.

10. Even assuming that the evidence of P.Ws. 1 and 2 are true and recovery has been made as alleged by the prosecution, the question still remains as to whether the prosecution has established that the house in question was either in the possession or enjoyment of the accused or he is the owner of the building. P.W.1 would say that in order to find out whether the property belonged to the accused or he was in possession of the same, he made efforts. The evidence furnished by P.W.7 is equally hopeless. He pointed out that going by Ext.P10, it is not possible to find out whether at the relevant time the appellant was the owner of the building.

11. The evidence of P.W.6 is to the effect that when she was questioned by the Investigating Officer, she told him that at the relevant time she had rented out the building to the accused and she had the agreement with her. It was further deposed that she wanted to handover the agreement to him, but the Investigating Officer refused to receive the same.

12. P.W.7 is the Investigating Officer. His version is that P.W.6 never told him that the property had been let out to the accused. He would say that the accused was asked to find out buyers for the property. To a definite question whether there is any material to show that the accused was the owner of the house or he was in possession of the same, the answer given by P.W.7 was in the negative.

13. As things now disclosed, when P.W.6, who was the owner of the building, says that she had an agreement with her by which the accused was put in possession, for reasons best known to P.W.7, the investigating officer, he did not seize the document and produce it before court. One fails to understand the reason as to why the prosecution is shy to have the documents produced.

14. In the result, there are no documents to show that at the relevant time, the petitioner was the owner of the building or in possession of the same. The conviction cannot stand.

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.