IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 4TH DAY OF DECEMBER 2015/13TH AGRAHAYANA, 1937

CRL.A.No. 979 of 2006 ( )

AGAINST THE JUDGMENT IN SC 181/2005 of ADDITIONAL SESSIONS COURT (ADHOC)-II, THODUPUZHA

IN CP 24/2005 OF JUDICIAL FIRST CLASS MAGISTRATE-I (FOREST OFFENCES),TPA

APPELLANT(S)/ACCUSED.:

JAYAGOSH, S/O.RAVI, CHERIYAMKUNNEL VETTIL
VANNAPPURAM KARA, VANNAPPURAM VILLAGE, THODUPUZHA.

BY ADV. SRI.SHAJI THOMAS PORKKATTIL

RESPONDENT(S)/COMNPLAINANT.:

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

2. THE SUB INSPECTOR OF POLICE,
KALIYAR.

BY PUBLIC PROSECUTOR SMT. S. HYMA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 04-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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P.BHAVADASAN, J.

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Crl.A. No. 979 of 2006

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Dated this the 04th day of December, 2015

J U D G M E N T

The accused, though prosecuted for the offences punishable under Sections 55(a) and (i) of the Abkari Act, was acquitted of the offence under Section 55(a), but was unfortunate to have been found guilty for the offence under Section 55(i) of the Abkari Act. He was therefore convicted for the said offence and sentenced to undergo rigorous imprisonment for six months and to pay a fine of ₹1 lakh with a default clause of rigorous imprisonment for a further period of three months.

2. The incident which gave rise to this case occurred on 08.11.2003. While PW3, the Sub Inspector of Police attached to Kaliyar Police Station along with his team of officers was on patrol duty, he received reliable information of illegal sale of liquor being done behind the shop of one Bava by the accused. PW3 and others reached the spot.

They located the accused, who had a bag with him and on seeing the officers, he tried to make good his escape. He was effectively intercepted and the bag was examined. It was found to contain 10 bottles of Majestic XXX Rum of 375ml each and another bottle of 375ml capacity contained 100ml of liquor. An amount of ₹380/- was recovered from him. From behind the said shop, two empty bottles and a glass were also recovered. Two of the bottles containing 375ml of liquor was taken as sample by PW3 and sealed and they were numbered as 'S1' and 'S2' respectively. The balance contraband article was emptied into a bottle and sealed. He prepared Ext.P1 seizure mahazar. He returned to the Station along with the accused, the contraband article and the documents and registered crime No. 176/2004 as per Ext.P2 FIR. He prepared the property list which is Ext.P3 and had the accused, the articles and the documents produced before court. He then preferred a forwarding note to have the samples sent for chemical analysis which is

Ext.P4. Further investigation was conducted by PW4. He obtained the Chemical Analysis Report namely, Ext.P6, completed the investigation and laid charge before court.

3. The court before which the final report was laid, took cognizance of the offence and finding the offence to be exclusively triable by a Court of Sessions, committed the case to Sessions Court, Thodupuzha under Section 209 of Cr.P.C. after following the necessary procedures. 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 appearance of the accused before the said court, framed charges for the offences punishable under Sections 55(a) & (i) of the Abkari Act.

5. To the charge, the accused pleaded not guilty and claimed to be tried. The prosecution therefore had PWs 1 to 4 examined and had Exts.P1 to P6 marked. MOs 1 to 6 were got identified and marked.

6. After the close of 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. According to him, in order to save somebody else, he has been made the scapegoat.

7. 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.

8. The court below, greatly impressed by the evidence of PW3 along with the contemporaneous document namely, Ext.P1 mahazar and the prompt production of articles and the accused before court, though found the offence under Section 55(a) is not made out, was inclined to hold that the offence under Section 55(i) is clearly established. Conviction and sentence as already mentioned followed.

9. Assailing the conviction and sentence, the learned counsel appearing for the appellant mainly raised two grounds for consideration. They are (1) going by the forwarding note, the bottle carrying the number 'S1' has to be sent for chemical analysis. On a perusal of Ext.P6 would show that it is not that sample that was analysed, but it was a totally different article and (2) it is pointed out by the learned counsel that the mere possession of liquor and some money with the person and even assuming that the glass which was located by the Police party was also there, does not lead to the irresistible conclusion that the commodity carried by the accused was for sale. That is a matter for proof.

10. Elaborating on the first point, the learned counsel pointed out that the evidence of PW3 is clear to the effect that he had taken two samples and labelled them as 'S1' and 'S2'. It was out of those two samples, that 'S1' was sought to be sent for chemical analysis. From Ext.P6, it can be seen

that it was not that sample which was either sent or analysed. Therefore, there is no guarantee that the sample analysed in the chemical analysis laboratory is the sample collected by PW3 while seizing the contraband article from the possession of the accused.

11. Elaborating on the second aspect, the learned counsel pointed out that sale being a conscious act, there must be some evidence in that regard and it is not a matter for presumption. Nowhere in his evidence, PW3, the Detecting Officer makes mention of any iota of evidence to reach the conclusion that the accused was engaged in the sale of liquor. Reliance was placed on the decision reported in **Sidhan v. State of Kerala (**2014 (2) KLT 893) contend for the position that the word 'sells' in Section 55(i) is an act *in presenti* and not a past sale. In other words, according to the learned counsel, there should be an actual evidence of sale found by PW3 in order to attract Section 55(i), which is conspicuously absent in the case on hand. For these

reasons, according to the learned counsel, conviction cannot stand.

12. The learned Public Prosecutor on the other hand tried to sustain the conviction. According to her, there is no reason to disbelieve PW3, for, there is nothing shown that he had an axe to grind or that he carried ill-will towards the accused. The fact the he was able to collect 10 bottles full of liquor and one of the bottles contained only 100 ml and also from a glass from nearby place, taken along with the fact the accused had money with him, must lead to the conclusion that money so found with the accused is as a result of the sale of liquor. According to the learned Public Prosecutor, the accused was rightly convicted for offence under Section 55(i) of the Abkari Act.

13. Even after making best efforts, this Court is unable to accede to the contentions raised by the learned Public Prosecutor. The learned counsel for the appellant seems to be well founded regarding the sample as well as the sale.

14. PW3 is the Detecting Officer. He claims to have been on patrol duty along with his team of officers and he received reliable information that the accused was engaged in the sale of liquor behind the shop of one Bava. He proceeded to the spot and the rest is narrated in Ext.P1 mahazar. It is unnecessary to produce here the entire narration of facts as contained in Ext.P1. Suffice to say that for the purpose of this case, he had taken two samples from the contraband articles numbered as 'S1' and 'S2'. By Ext.P4 forwarding note submitted to the court by PW3, he had specifically sought for sending the sample labelled as 'S1' for chemical analysis. However, the Chemical Analysis Report namely, Ext.P6, states that what was received for analysis was clear and brownish liquid with smell of foreign liquor and that the sample of liquid contained 42.08% by volume of ethyl alcohol.

15. There is no comparison between what was sought for and what was analysed. It therefore creates a

reasonable doubt in the mind of the court as to whether the article analysed in the chemical analysis laboratory is the sample alleged to have been collected by PW3 while seizing the contraband article from the accused. Nowhere in the report, it is seen mentioned that the bottle was numbered as 'S1' of which chemical analysis was sought for by PW3. It is also difficult to find from the property list submitted to court, any commodity answering the description as contained in Ext.P6. The obvious conclusion is that the sample analysed is something different.

16. Normally, the above finding would have been sufficient to put an end to the case. However, since it is argued that there was no element of sale, that contention is also being dealt with. Section 55(i) of the Abkari Act reads as follows:

> “55(i):- Sells or stores for sales liquor or any intoxicating drug”.

17. The allegation in the present case seems to be that the accused was engaged in the sale of liquor as

contemplated under Section 55(i) of the Abkari Act. Dealing with an almost identical situation, this Court had occasion to consider the meaning of the word 'Sells' in the decision reported in **Sidhan v. State of Kerala** (2014 (2) KLT 893) wherein it was held as follows.:

> “17. Argument advanced by the learned counsel for the accused is that for booking a person for the first limb of S.55(i) of the Act (ie., for sale of liquor), it must be established that the detecting officer saw the accused actually selling the liquor. Learned counsel for the accused argued that the word 'sells' used in the statute in present tense assumes great importance. According to the accused, it indicates that the sale should be one happening at the time of detection. In other words, a person cannot be arrested alleging that he sold liquor at an earlier point of time. It is the contention of the accused that use of present tense in the provision is indicative of the fact that a person can be arrested only when he is found to be engaged in sale of liquor. This argument is opposed by the learned Prosecutor by contending that it is not the law that the accused could be arrested

only when he is found selling the liquor. He can be booked for the offence under S.55(i) of the Act, if he possessed liquor for sale. If we consider the two aspects dealt with in S.55(i) of the Act, it is evident that both sale of liquor and storage of the same for the purpose of sale are made punishable. I am of the view that the word 'sells' in S.55(i) of the Act is used by the legislature with a definite purpose. What is sought to be prevented by the provision is illicit sale of liquor. It is axiomatic that the legislature may not use any word or expression without ascribing a meaning to it or without intenting any result or effect unless the subject or context clearly indicate otherwise. Here, it is evident that the legislature wanted to make unauthorised sale of liquor an offence. The expression “sells” in S.55(i) of the Act can only be viewed as a sale *in presenti* and not a past sale. In other words, what is to be detected for making out an offence is actual sale of liquor or all preparedness for a sale of liquor. It is futile to contend that the offence is revealed only when the detecting officer saw the accused pouring liquor from a bottle to a tumbler and another person receiving the same for consideration. Allegations and proof by the prosecution to that extent need not be

> insisted. In my opinion, going by the expression 'sells' in S.55(i) of the Act, the offence can lawfully be inferred, if the facts and circumstances alleged and proved in a particular case would lead to the irresistible inference, that the accused possessed liquor, even if it is for a prospective sale. Finding the accused with illicit liquor and in full preparedness for sale of it, like holding a tumbler for the use of customers, possessing cash received as sale proceeds, etc. are some indications to presume that the accused is engaged in sale of liquor. This illustration shall not be taken as exhaustive. There can be umpteen situations in which it can lawfully be deduced that the accused possessed liquor for effecting a prospective sale. The only requirement is that the prosecution should allege and prove facts and circumstances to indicate that the accused intended an illicit sale of liquor."

18. This Court, after considering the various aspects of the issue, held that mere possession of illicit liquor with a glass alone may not be sufficient to draw a conclusion that the accused was engaged in the sale of illicit liquor. That is

a matter for proof. There should be some evidence in that regard and it may be even oral evidence. But, without anything more, mere seizure of contraband article with money in the possession of the accused cannot automatically lead to the conclusion that the money found with the accused is a sale proceeds of the liquor.

19. If one is to apply the principle laid down in the decision referred to above, certainly in the case on hand, it fails to meet the required standards.

For the above reasons, this Court is unable to uphold conviction passed by the court below and it needs to be interfered with. This appeal is allowed. The conviction and sentence passed by the court below are set aside and the accused stands acquitted of all charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

Sd/-
P.BHAVADASAN
JUDGE

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//True copy//

P.A. to Judge