

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.ABRAHAM MATHEW

FRIDAY, THE 20TH DAY OF FEBRUARY 2015/1ST PHALGUNA, 1936

CRL.A.No. 655 of 2014 (A)

**AGAINST THE JUDGMENT IN SC 977/2012 OF ADDITIONAL SESSIONS JUDGE-II,
KASARAGOD DATED 11-12-2013**

**AGAINST THE ORDER/JUDGMENT IN CP 492/2011 OF JUDICIAL FIRST CLASS
MAGISTRATE-I, KASARAGOD DATED 04-04-2012**

APPELLANT:

JANARDHANAN, C.NO.2477, CENTRAL PRISON, KANNUR

BY ADV. SMT.ASHA BABU (STATE BRIEF)

RESPONDENT:

**STATE OF KERALA
REPRESENTED BY EXCISE INSPECTOR, KUMBALA EXCISE RANGE
THROUGH PUBLIC PROSECUTOR HIGH COURT OF KERALA
ERNAKULAM**

BY PUBLIC PROSECUTOR SMT. BINDU GOPINATH

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 20-02-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

shg/

C.R.

K. ABRAHAM MATHEW, J.

Crl.A. No.655 of 2014

Dated this the 20th day of February, 2015

J U D G M E N T

The second accused in Sessions Case No.977/2012 on the file of the Additional Sessions Judge-II, Kasaragod who has been convicted of the offence under Section 8 of the Abkari Act and sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs.1 lakh with a default clause is the appellant. The prosecution case is that he had in his possession 3194 packets each containing 100 ml. of arrack which were found concealed in a secret chamber in his house.

2. Heard Smt. Asha Babu learned counsel for the appellant and the learned Public Prosecutor.

3. On 21.12.2007 PW3, Excise Officer attached to Kumbala Excise Range Office, was on patrol duty when he got the information that arrack was kept in the house of the

appellant. PW3 prepared a search memo and thereafter, he along with PW1 S.I. of Police went to the house of the appellant, which was found locked. They broke open the front door and searched the rooms. In the room in the south-west they found a secret chamber on the floor which had been covered with a 'kadappa' stone. There were seven plastic bags in the chamber. Six bags contained 500 packets and the last one 194 packets. Three packets were opened. The contents was found to be arrack, the total quantity of which was 319.4 litres. There were Kannada writings on the packets. The contents of the three packets were mixed up and 290 ml. of arrack was taken as sample in a 375 ml. capacity bottle; it was sealed at the place of occurrence. Ext.P2 is the search list prepared by PW3 and signed by PW2 and PW4. This, in brief, is the evidence given by PW1 and PW3. There are no contradictions in the evidence of PW1 S.I. of Police and PW3 Excise Inspector. There is no reason to disbelieve their evidence.

4. The seized articles were produced before the

Assistant Excise Commissioner. He destroyed it complying with the directions in Section 53 A Abkari Act. Ext.P8 is the inventory prepared for the articles and Ext.P9 are their photos.

5. PW2 is an attesting witness in Ext.P1 mahazar and Ext.P2 search list. As he was about to go to Sabarimala for pilgrimage he was not expected to enter the house from where the liquor was seized and so he stood outside. The seized articles were dumped outside the house. In his evidence nothing could be brought out to show that he is not a reliable witness. To some extent his testimony supports the evidence of PW1 and PW3 that arrack was seized from the house.

6. PW4, the second attesting witness to Exts.P1 and P2 denied having witnessed the seizure or preparation of the sample. But he admitted that he signed Ext.P1 mahazar and Ext.P2 search list. There is no explanation how he happened to put his signature. So his testimony that he did not witness the incident does not appear to be true.

7. Ext.P13 ownership certificate produced by PW6 Secretary of Mangalpady Grama Panchayat proves that the house from which the contraband articles were seized belongs to the appellant. There is no evidence that it was in the possession of anyone else, or for that matter there is not even a suggestion that it was in the possession of someone else. The only conclusion that can be reached is that the house was in the ownership and possession of the appellant.

8. Smt. Asha Babu learned counsel for the appellant submitted that the contents of three packets was mixed up and this vitiated taking of the sample. She relied on the decision of the Supreme Court in **Vishwanath v. State of Maharashtra [(2005) 9 SCC 599]**. The law applicable in that case provided that no person shall be in possession of more than 5 litres of liquor which made the quantity in possession of the accused relevant in that case. It was in that context the Supreme Court held that samples taken from different bottles in a single bottle vitiated the preparation of the sample. In this case the liquor was

arrack. Possession of even a drop of arrack is an offence; the quantity is immaterial. The moment the prosecution proves that the accused was in possession of arrack, the offence is attracted. The decision of the Supreme Court will not help the appellant.

9. Reliance was placed on the decision of this Court in **Ravi v. State of Kerala [2011 (3) KLT 627]** in support of the argument that the prosecution failed to prove that the seized articles were in the possession of the appellant. In the said decision the learned Judge held that only because an article is found kept or stored in a building or house the owner or occupier of such building cannot be said to have stored the article nor can it be said that he is in possession of such article. There is no quarrel about the proposition.

10. Learned counsel for the appellant submitted that when the articles were seized the appellant was in judicial custody in connection with another abkari case and so it can never be said that he was in possession of the seized

articles.

11. Possession is a question of fact. The concept of possession has been considered by the Apex court in **Superintendent & Remembrancer, Legal Affairs v. Anil**

Kumar [AIR 1980 SC 52]:

“13. “Possession” is a polymorphous term which may have different meanings in different contexts. It is impossible to work out a completely logical and precise definition of “possession” uniformly applicable to all situations in the contexts of all statutes. Dias & Hughes in their book on Jurisprudence say that if a topic ever suffered from too much theorizing it is that of “possession”. Much of this difficulty and confusion is (as pointed out in Salmond's Jurisprudences, 12th Edition, 1966) caused by the fact that possession is not purely a legal concept. “Possession”, implies a right and a fact; the right to enjoy annexed to the right of property and the fact of the real intention. It involves power of control and intent to control. (See Dias and Hughes, *ibid*).

14. According to Pollock & Wright “when a person is in such a relation to a thing that, so far as regards the thing, he can assume, exercise or resume manual control of it at pleasure, and so far as regards other persons, the thing is under the protection of his personal presence, or in or on a house or land occupied by him or in any receptacle belonging to him and under his control, he is in physical possession of the thing”.

15. While recognizing that 'possession' is not a purely legal concept but also a matter of fact; Salmond (12th Edition, pages 52) describes 'possession, in fact', as a relationship between a person and a thing. According to the learned author the test for determining 'whether a person is in possession of anything is whether he is in general control of it'.

16. In *Gunwantlal* (ibid), this Court while noting that the concept of possession is not easy to comprehend, held that, in the context of Section 25(a) of the Arms Act, 1959, the possession of a firearm must have, firstly, the element of consciousness or knowledge of that possession in the person charged with such offence, and secondly, he has either the actual physical possession of the firearm or where he has not such physical possession, he has nonetheless a power or control over that weapon. It was further recognized that whether or not the accused had such control or dominion to constitute his possession of the firearm, is a question of fact depending on the facts of each case. In that connection, it was observed: "In any disputed question of possession, specific facts admitted or proved will alone establish the existence of the de facto relation of control or the dominion of the person over it necessary to determine whether that person was or was not in possession of the thing in question."

12. Even where members of the family of an accused reside with him in the house from which a contraband article is seized there may be circumstances from which the court can reach a conclusion that the article was in his conscious possession. It is unreasonable to say that invariably in all cases in which a seizure is made from a house in which several persons reside one of them cannot be held to be in conscious possession of it. In **Assistant Collector v. Pavunni [1988 (2) KLT 194]** a wooden box

containing gold biscuits kept buried in the courtyard of the house of the accused was discovered by customs officers. It was smuggled gold. The accused was the owner in possession of the premises. The spot where gold was found buried was only 2 ft. from the wall of the prayer room in the house of the accused. There was a window near the spot. The court acted upon these facts to hold that the contraband was in the conscious possession of the accused. The learned Judge has made the following observation: "In some cases, even the very fact of possession of the place of concealment would help the court in drawing inference regarding the mental state of the person in possession of that place, if situations in those cases would justify such inference".

13. The conviction was confirmed by the Supreme Court in **K.I. Pavunny v. Assistant Collector [(1997) 3 SCC 721]**. It is true that in that case a statement given under Section 108 of the Customs Act also was accepted as valid. The learned counsel for the appellant very

vehemently argued that since the appellant was in judicial custody at the time of seizure by no stretch of imagination it can be held that he was in conscious possession of the articles. Absence of an accused at the place of occurrence at which the seizure was made is no reason to hold that he was not in conscious possession of the contraband article. He may leave the place after its concealment or he may happen to be in custody of competent authorities in connection with some other incident as it happened in this case. His absence at the time of seizure does not warrant a conclusion that he was not in possession of it. But where there is reason to believe that concealment took place during his absence the conclusion can be different. Once relationship between a person and a thing is established his intention to possess it is a matter for inference. It depends upon the facts and circumstances of each case.

14. In the case on hand the contraband articles were found concealed in a secret chamber made on the floor of the house. It was a permanent construction. The chamber

had been covered with a 'kadappa' stone. Only the owner could have made the construction. I have already entered a finding that the house from which the articles were seized was in the ownership and possession of the appellant. The irresistible conclusion is that he alone constructed the secret chamber. The purpose is crystal clear. I have no doubt that he was in possession of the seized articles. The learned Sessions Judge rightly convicted him of the offence under Section 8 of the Abkari Act. No interference is called for.

15. The appellant has been sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs.1 lakh and in default of payment of fine to undergo rigorous imprisonment for a further period of six months. It is not in dispute that the appellant was involved in other abkari cases also. He was in judicial custody when the seizure was made in this case. Having regard to this fact and the fact that the quantity seized is huge and it was brought from Karnataka by no stretch of imagination it can

be said that the sentence is harsh.

In the result, this appeal is dismissed.

Sd/-
K. ABRAHAM MATHEW
JUDGE

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P.A. TO JUDGE

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