IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

THURSDAY, THE 17TH NOVEMBER 2005 / 26TH KARTHIKA 1927

CRL.A.No. 931 of 2001()

SC.43/2000 of ADDL.ASSISTANT SESSIONS COURT, PARAVUR

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APPELLANT:

DEVASSY, S/O. DEVASSY, PANIKULAM HOUSE,
MANJAPRA, VADAKKUMBHAGAM KARA,
MANJAPRA VILLAGE, ALUVA TALUK.

BY ADV. SRI.P.V.KUNHIKRISHNAN

RESPONDENTS:

STATE OF KERALA.

BY PUBLIC PROSECUTOR SRI.K.THAVAMANY

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 17.11.2005, THE COURT ON 17/11/2005 DELIVERED THE FOLLOWING:

K.HEMA, J.

CRL.A.NO.931 of 2001

Dated this the 17th day of November, 2005

JUDGMENT

The appellant was convicted and sentenced to undergo simple imprisonment for one year and to pay a fine of Rs.1,00,000 and in default of payment, to undergo simple imprisonment for one year under Section 8(1) and (2) of the Abkari Act. The said conviction and sentence are challenged in this appeal.

2. According to prosecution, on 12.9.1997 at about 2.30 p.m. the appellant was found proceeding along a public road carrying some paper packets and on seeing the Excise party, he was found moving away and on being suspicious of his conduct, PW3 and the Excise party approached him and examined the paper packets. It was found to contain two bottles having a capacity of 375 ml. containing full of brown coloured liquid. PW3 tested the nature of the liquid by taste and smell and found that it was coloured arrack. The appellant was arrested from the spot. Both the bottles were sealed from the spot and seized under Exhibit P1 mahazar in the presence of PWs 1 and 2. An occurrence report was prepared as Exhibit P2. The article was sent for chemical analysis through court and the report of chemical analysis is Exhibit P4, as per which the article was reported to contain ethyl alcohol. Hence the accused stood a trial under section 8(1) and (2) of the Abkari Act (`the Act' for short).

3. The prosecution examined PWs 1 to 4 and marked Exhibits P1 to P4 on the side of the prosecution. The accused did not adduce any evidence. The court below found that the evidence of PWs 3 and 4 Excise officials were believable and that the prosecution

established that appellant transported illicit liquor along a public road as alleged by the prosecution. Accordingly he was convicted under Section 8(1) and (2) of the Act. It was held that PWs 3 and 4 were cross-examined at length, but nothing was brought out to discredit their testimonies.

4. Learned counsel appearing for appellant challenges the finding of guilt mainly on the ground that there is no proof for the fact that the alleged article recovered from the possession of the appellant is liquor or arrack as alleged by the prosecution. According to the prosecution, two bottles containing 375 ml. each of coloured liquid were seized from the possession of the appellant by PW3 in the presence of PW4 and independent witnesses, PWs 1 and 2. The prosecution has also a case that the article is coloured arrack.

5. To prove the case PWs 1 to 4 were examined. PWs 1 and 2 turned hostile to the prosecution. They denied having seen the accused in possession of arrack. PW1 denied appellant's signature in Exhibit P1, though PW2 admitted the signature in Exhibit P1 mahazar. He stated that he did not see the accused with any liquor. He also did not know the contents of Exhibit P1. The lower court did not place any reliance on their evidence. However, PWs 3 and 4 gave evidence supporting the prosecution case. Both of them said that two bottles containing 375 ml. of arrack were seized. According to PW3, he identified the nature of the article as coloured arrack by taste and smell. PW4 also corroborated this evidence. So the prosecution case is that two bottles containing 375 ml. of arrack were seized from the possession of accused.

6. It was pointed out that there is discrepancy in respect of the alleged seizure. Though the prosecution would claim that two bottles of 375 ml. of liquor were seized, the article sent for

chemical analysis as seen from Exhibit P4 record and also the forwarding note, Exhibit P3, is a bottle containing 180 ml. of liquid. The prosecution has no explanation how and under what circumstances a bottle containing 180 ml. of liquid was sent for chemical analysis. What happened to the articles seized is also not explained. As per the evidence of PWs 3 and 4 and Exhibit P1 mahazar, the articles seized from the possession of the accused were sealed from the place of occurrence itself. The evidence being that the article forwarded for analysis is 180 ml. of liquid in a bottle, it is the duty of the prosecution to explain that the said article was the one taken from the possession of the appellant. In the absence of any explanation, it has to be reasonably inferred that the article sent for chemical analysis and the article seized from the possession of the appellant which were sealed at the scene of occurrence are different.

7. Admittedly, the article seized is a coloured liquid. But, arrack is a colourless liquid. But what is seized from the possession of the appellant is a coloured liquid. Unless and until the article itself is produced and marked, it is not possible to hold whether the article is arrack or not. The article which is allegedly seized is not marked in this case and there is no explanation for the omission. In the light of the discrepancies already discussed, merely on the basis of the evidence of PWs 3 and 4 that PW3 has tested the nature of the liquor, it is not possible to conclude that the article seized from the possession of the accused is arrack. Therefore, the conviction and sentence passed against the appellant under Section 8(1) and (2) of the Act are not sustainable.

8. The court below has not considered whether the article seized in this case is arrack or not. Nothing is discussed in the

judgment in this aspect. So also it has not been considered whether there was any discrepancy in sending of the article and getting it examined by the Chemical Analyst. Both the points were omitted to look into by the court below. A conviction cannot be entered into under Section 8(1) and (2), unless and until it is established that the article seized from the possession of the accused is arrack. There is no finding that the article is arrack.

9. The conviction and sentence passed against the appellant are set aside. The appellant is found not guilty under Section 8(1) and (2) of the Act. He is acquitted of the said offence. He is set at liberty forthwith.

Appeal is allowed.

K.HEMA, JUDGE

vgs

K.HEMA, J.

CRL.A.NO.931 OF 2001

JUDGMENT

17.11.2005