IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 9TH DAY OF NOVEMBER 2015/18TH KARTHIKA, 1937

CRL.A.No.917 of 2004 (B)

AGAINST THE JUDGMENT IN SC 98/2004 of ADDITIONAL SESSIONS COURT (ADHOC) FAST TRACK-I, THRISSUR, DATED 27-05-2004

APPELLANT(S)/ACCUSED:

VELAN @ VELAYUDHAN, S/O.AYYAPPAN,
PARAKATTUPADDY, KUTHAMPULLY DESOM, KANIYARKODE
VILLAGE, THALAPPILLY TALUK.

BY ADV. SRI.GRASHIOUS KURIAKOSE

RESPONDENT(S)/COMPLAINANT:

STATE- C.I. OF EXCISE, WADAKKANCHERRY,
EP. BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA
ERNAKULAM.

PUBLIC PROSECUTOR SMT. SEENA RAMAKRISHNAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 09-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ss

K. RAMAKRISHNAN, J.

Crl. Appeal No.917 of 2004

Dated this the 9th day of November, 2015

JUDGMENT

Accused in S.C.No.98/2004 on the file of the Additional Sessions Court (Ad-Hoc-I), Thrissur, is the appellant herein. The appellant was charge-sheeted by the Circle Inspector of Excise, Wadakkanchery Excise Range in C.R.No.4/1999 of Pazhayannur Excise Range under Section 55(a) of Abkari Act.

2. The case of the prosecution in nut shell was that, on 29.01.1999 at about 2.00 p.m., the accused was found transporting 20 bottles of Indian Made Foreign Liquor of 375 ml., each of various brand through the road in front of Government U.P. School, Kuttambulli in Kaniyarcode Village without having any documents and seal of the Kerala State Beverages Corporation in violation of the provisions of Abkari Act and thereby he had committed the offence punishable under Section 55(a) of the Kerala Abkari Act.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court, Wadakkanchery, where it was taken on file as C.P.No.42/2003, thereafter it was committed to the Sessions Court, Thrissur by the learned magistrate under Section 209 of the Code of Criminal Procedure. After committal, the Sessions Court had taken cognizance of the case as S.C.No.98/2004 and it was made over to the Additional Sessions Court (Ad-hoc-I), Thrissur, for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under Section 55(a) of Abkari Act was framed and the same was read over and explained to him and he pleaded not guilty. In order to prove the case of the prosecution, PWs 1 to 6 were examined and Exts.P1 to P12 and MO1 series, MO2 series, MO3 and MO4 were marked on the side of the prosecution. After closure of the prosecution evidence, the accused was questioned under Section 313 of the Code of Criminal

Procedure and he denied all the incriminating circumstances brought against him in the prosecution evidence and he had further stated that, no article was seized from his possession and he has been falsely implicated in the case. He was travelling in a bus from Ottappalam and the Excise officials wanted to know about the cardboard box which was kept under his seat and on account of the same there was some altercation occurred and he has been taken from the bus and falsely implicated in the case. Since the evidence in the case did not warrant an acquittal under Section 232 of the Code of Criminal Procedure, the Additional Sessions Judge directed the accused to enter on his defence. DW1 was examined on the side of the accused to prove his case. After considering the evidence on record, the court below found the appellant guilty under Section 55(a) of Abkari Act and convicted him thereunder and sentenced him to undergo rigorous imprisonment for one year and also to pay a fine of

₹1,00,000/-, in default to undergo rigorous imprisonment for three months more. Set off was allowed for the period of detention already undergone by him in this case. Aggrieved by the same, the present appeal has been preferred by the appellant/ accused before the court below.

5. Heard Sri.Grashious Kuriakose, Senior counsel appearing for the appellant and Smt.Seena Ramakrishnan, learned Public Prosecutor appearing for the State.

6. The counsel for the appellant submitted even assuming that the entire case of the prosecution is admitted, it will be only amount to possession of excess quantity of Indian Made Foreign Liquor, which will be punishable under Section 63 of Abkari Act and not under Section 55(a) of Abkari Act. There is no allegation that it is illicit liquor that has been either transported or illegally imported and thereby the court below was not justified in convicting the appellant for the offence alleged.

7. On the other hand learned Public Prosecutor submitted that it will be seen from the evidence that there was no sticker of the Kerala State Beverages Corporation seen and there is nothing to show that it was obtained from the authorized depot by the petitioner and he was not having any documents in his possession as well. So under the circumstances, court below was perfectly justified in convicting the appellant for the offence alleged.

8. The case of the prosecution as emerged from the prosecution witnesses was as follows:

On 29.01.1999 at about 2.00 p.m., PW1 the Excise Inspector along with PW4/ Preventive Inspector were doing patrol duty and when they reached near the place of occurrence namely, in front of Government U.P. School Kuttambulli in Kaniyarcode Village, they found the accused coming with MO3 cardboard box tied with MO4 thread and on seeing the excise party, he tried to go away from that place. So PW1 stopped him and on verification of MO3 box, it was found that it contained MO1 series 13 bottles of 375 m.l Vorion Doctor's Brandy and 5 bottles of 375 ml (MO2 series) Johar Fine Brandy without sticker of the Kerala State Beverages Corporation was found and he took one bottle each from each category and on verification it was found that it is Indian Made Foreign Liquor. When he questioned him it was revealed that he obtained the same from some unknown person. He was not having any documents with him to show that it was purchased from any authorized dealer. So he had taken the opened bottle as sample and sealed the same and affixed label and thereafter sealed MO1, MO2 and MO3 and seized the same as per Ext.P1seizure mahazar in the presence of PWs 2 and 3. Thereafter he arrested the accused and prepared Ext.P2 arrest memo and gave Ext.P3 arrest and intimation to his brother. He conducted body search and prepared Ext.P4 body search report and found no other incriminating articles were seized from his possession. Thereafter he came to excise office and registered Ext.P6 crime and occurrence report as crime No.4/1999 of Pazhayannur Excise Range against the accused under Section 55(a) of Abkari Act and he produced the accused before court along with Ext.P5 remand report. He produced the articles along with Ext.P8 series of labels and Ext.P7 property list. He sent Ext.P9 forwarding note to the court with request to send the samples for chemical analysis and on the basis of the requisition, the sample bottles were sent for analysis and Ext.P12 chemical analysis report obtained. The investigation in this case was conducted by PWs 5 and 6. They questioned the witnesses and recorded their statements. They prepared Ext.P11 sketch of the place of occurrence and prepared Ext.P10 scene mahazar of the place of occurrence. He collected Ext.P12 certificate and produced the same before Court. PW6 completed the investigation and submitted final report.

9. PWs 2 and 3 are independent witnesses to

the seizure. Though they admitted that they knew the accused, they denied having seen the arrest and seizure of the articles. They have even denied the signature in Exts.P1 and P2. So it is clear from their evidence that, they are now trying to help the accused and that was the reason why they are not supporting the case of the prosecution.

10. The case of the accused was that, he was travelling in the bus and there was some altercation occurred between him and the excise officials who entered the bus and checked the bus and on account of that enmity he was taken from the bus and was falsely implicated in the case. In order to prove his case DW1 was examined. According to him he was also travelling in the same bus from Ottappalam to Kondotty and when the bus reached the place of occurrence, the excise officials entered into the bus and there was some altercation occurred between the accused and the excise officials and he was taken from the bus. He had admitted that, though he knew the accused

personally and they were travelling in the bus together, he did not inform about the same to the family members and he did not raise any protest against the same as well. So court below was perfectly justified in rejecting the evidence of DW1 on this aspect.

11. Then the evidence available is that of PWs 1 and 4, the detecting officer and the excise officials who accompanied PW4. PW1 had categorically stated that on that day, he along with PW4 was doing patrol duty and when they reached the place of occurrence, they saw accused coming with MO3 cardboard box and on seeing the excise party, he tried to go away from that place. So they stopped him and verified the contents found MO2 series bottles containing Indian Made Foreign Liquor. They have also deposed that the bottle did not contain the sticker of the Kerala State Beverages Corporation and when they asked the accused, he was not able to produce any document to show from where he purchased the same as

well. According to them, when they questioned the accused he told that he obtained it from some unknown person. After complying with the formalities and taking sample and affixing label and sealing the bottles, the same were seized as per Ext.P1 mahazar and the accused was arrested and taken to excise office and the case was registered. Though they were cross examined at length, nothing was brought out to discredit their evidence on this aspect. The suggestion given to them was that, he was taken from the bus was also denied by them. So under the circumstances, court below was perfectly justified in relying on the evidence of PWs 1 and 4 and rightly came to the conclusion that the prosecution has proved that the accused was found to be in possession of Indian Made Foreign Liquor which does not contain the requisite sticker of the Kerala State Beverages Corporation.

12. It is seen from the evidence that there was no delay in producing the article before court. Further there

is no dispute regarding the fact that the article seized was Indian Made Foreign Liquor. Then the question is whether offence under Section 55(a) of Abkari Act is attracted or not. In this case, it is not mere possession of Indian Made Foreign Liquor, but it was found transitting the same and it was at that time he was intercepted by the excise officials. Further it was not having any sticker of the Kerala State Beverages Corporation and the appellant was not having any document with him to show that it was purchased from any authorized depot. So under the circumstances, the dictum laid down in the decision reported in **Mohanan v. State of Kerala (2007(1) KLT 845)** and **Sabu v. State of Kerala (2003(2) KLT 173)** are not applicable to the facts of this case. In those cases, the accused was found to be in possession of bills obtained from the depot of the Kerala State Beverages Corporation and there was no evidence to show that it was not having the seal or sticker of the Kerala State Beverages Corporation and it was obtained from a proper authority. In this case, there is no evidence adduced on the side of the accused to prove that he obtained the same from any lawful authority. He was not having any bill with him. So once it is proved by the prosecution that he was found to be in possession of the contraband article, unless he was able to account for the same, the presumption under Section 64 of Abkari Act will be attracted and it can be presumed that it was intended to be used for the purpose committing the offence under Section mentioned under Section 55 of the Abkari Act. So under the circumstances, the court below was perfectly justified in convicting the appellant for the offence under Section 55(a) of the Abkari Act and there is no illegality committed by the court below on this aspect.

13. The counsel for the appellant also submitted that the sentence imposed is also harsh. The court below sentenced the accused to undergo rigorous imprisonment for one year and also to pay a fine of ₹1,00,000/-, in default

to undergo rigorous imprisonment for three months more. Set off was allowed for the period of detention already undergone by him. It may mentioned here the article that was seized was not prohibited article as such. But he was not able to produce any document for being keeping possession of the article. So under such circumstances, court below had come to the conclusion that he had committed the offence punishable under Section 55(a) of Abkari Act. So considering the circumstances and also the nature of contraband article seized, namely Indian Made Foreign Liquor, consumption of which though harmful not so grave as in the case of illegally manufactured arrack, this court feels that the some leniency can be shown in the sentence. It is seen from the order of the court below that the accused was arrested on 29.01.1999 and produced the court on 30.01.1999 at 12.45 p.m., and he was in judicial custody till 12.02.1999. So considering the circumstances, this court feels that the substantive sentence can be restricted to the period of detention already undergone and minimum sentence of fine can be imposed with default sentence of 15 days simple imprisonment will be sufficient and that will meet the ends of justice. So substantive sentence and default sentence imposed by the court below are set aside and the same is modified as follows:

The substantive sentence is restricted to the period of detention already undergone and further sentenced to pay a fine of ₹1,00,000/-, in default to undergo simple imprisonment for 15 days.

In the result, the appeal is allowed in part. The order of conviction and sentence of fine of ₹1,00,000/- imposed by the court below against the appellant under Section 55(a) of the Abkari Act are hereby confirmed. But the substantive sentence of one year rigorous imprisonment is reduced to imprisonment already undergone as under trial prisoner and default sentence is reduced to 15 days simple imprisonment. So the sentence is modified as follows:

The substantive sentence is reduced to imprisonment already undergone and further sentenced to pay a fine of ₹1,00,000/-, in default to undergo simple imprisonment for 15 days.

With the above modification of the sentence alone the appeal is allowed in part and disposed of accordingly.

Office is directed to communicate this judgment to the court below at the earliest.

Sd/-
K. Ramakrishnan, Judge

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P.A. to Judge

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