

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.UBAID

THURSDAY, THE 21ST DAY OF MAY 2015/31ST VAISAKHA, 1937

CRL.A.No. 827 of 2005 ()

**AGAINST THE JUDGMENT IN SC 294/2002 of ADDITIONAL DISTRICT COURT (ADHOC)
FAST TRACK COURT-I, PATHANAMTHITTA**

APPELLANT(S)/ACCUSED.:

**BIJU, S/O.MURALEEDHARAN NAIR,
PRIYA BAHVANAM, KARAKULAM VILLAGE, NEDUMANGADU TALUK.**

BY ADV. SRI.D.KISHORE

RESPONDENT(S)/STATE AND COMPLAINANT.:

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

**2. THE EXCISE INSPECTOR,
RANNY,.**

R1 BY ADV. PUBLIC PROSECUTOR SMT. LALIZA T.Y

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 21-05-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

sab

P.UBAID, J.

Crl. Appeal No. 827 of 2005

Dated this the 21st day of May, 2015

J U D G M E N T

The appellant herein challenges the conviction and sentence against him under Section 55(a) of the Kerala Abkari Act. The prosecution case is that on 21.12.1998 he was found possessing and transporting 3750 ml of Indian made foreign liquor to a prohibited area. He faced prosecution before the court of Session, Pathanamthitta in S. C No. 294 of 2002. The appellant was a passenger in a bus plying between Pathanamthitta and Pamba. On search in the bus, the Excise Inspector found the appellant carrying 10 bottles of XXX Rum having a total quantity of 3750 ml. The Excise Inspector arrested the accused and seized the 10 bottles of XXX Rum on the belief that the bottles were being transported by the accused to Pamba, a prohibited area. Thus came a complaint against him under Sections 9 and 55(a) of the Kerala Abkari Act. He pleaded

not guilty to the charge framed against him by the learned Additional Sessions Judge, Adhoc -I, Pathanamthitta and claimed to be tried.

2. The prosecution examined six witnesses in the trial court and marked Exts. P1 to P8 documents and also MO1 to MO3 properties. On an appreciation of the evidence, the learned trial Judge found the accused guilty under Sections 9 and 55(a) of the Kerala Abkari Act. Though the prosecution did not produce any notification showing that Pamba is a notified area, or that the place of detection will come within any notified area, the learned trial judge took judicial notice of the fact that Shabarimala and the surroundings including Pamba fall within notified area. Thus the accused happened to be found guilty under Section 9 of the Kerala Abkari Act also. On conviction under Sections 9 and 55(a) of the Kerala Abkari Act, the appellant was sentenced to undergo rigorous imprisonment for one year and also to pay a fine of ₹ 1,00,000/-. Aggrieved by the conviction and sentence the accused has come up in appeal.

3. When the appeal came up for hearing the learned counsel for the appellant submitted that on facts, the accused has nothing to argue, but he is entitled for the benefit under the law on important legal aspects, that in the absence of a notification produced by the prosecution there cannot be a conviction under Section 9 of the Kerala Abkari Act, and that even assuming the accused was found possessing excess quantity of Indian made foreign liquor purchased from the Kerala State Beverages Corporation, the conviction possible is only under Section 63 of the Kerala Abkari Act.

4. On hearing both sides and on a perusal of the records including the impugned judgment I find that the 10 bottles of Indian made foreign liquor seized by the Excise Inspector from the hands of the accused in this case were in fact purchased by the accused from the Kerala State Beverages Corporation. The prosecution has no case that the said quantity of liquor was illicitly brought to Kerala or imported to Kerala by the accused from any neighboring State. The judgment will show that all the 10 bottles were

found carrying label indicating that it is a product of Kerala State Beverages Corporation. The prosecution has no case that the accused was found selling liquor or that he transported the said quantity of the liquor for the purpose of sale. The charge is specifically under Section 55(a) of the Kerala Abkari Act and not under Section 55(i) of the Kerala Abkari Act. Legally and practically, the allegation can only be that the accused was found possessing excess quantity of Indian made foreign liquor.

5. When the prosecution alleges that the accused was found possessing liquor in a notified area, or that he was found transporting liquor to any notified area, the prosecution is bound to produce such a notification under Section 9 of the Kerala Abkari Act, notifying that area as a prohibited area. The alleged seizure was not made at Pamba, and it was admittedly far beyond Pamba, which is said to be a notified area. On such aspects judicial notice cannot be taken by courts. Anything covered by a notification must be proved by producing the notification itself. Here the question is a question of fact whether

Pampa or the place of detection is a notified area. That question of fact must be proved by the prosecution by producing the notification. Thus I find that in the absence of such notification under Section 9 of the Kerala Abkari Act the finding of guilt against the appellant under Section 9 is liable to be reversed, and it is accordingly reversed under Section 386(b)(i) Cr.P.C.

6. Now the question is how to deal with the other situation of possession of excess quantity of Indian made foreign liquor, when conviction under Section 9 goes. This possession is well covered by many decisions of this court including the latest one in **Sobichan @Joseph v. State of Kerala and Another in 2013 KHC 3358: 2013 (3) KLT SN 93**. Relying on the earlier decisions in **Sabu v. State of Kerala in 2003 (2) KLT 173** and **Mohan v. State of Kerala in 2007 (1) KLT 845** the learned Single Judge in **Sobichan @Joseph v. State of Kerala** held that mere possession of excess quantity of Indian made foreign liquor purchased from the Kerala State Beverages Corporation will not constitute the offence punishable under Section 55

(a) of the Kerala Abkari act and at the most it will constitute only the offence punishable under Section 63 of the Kerala Abkari Act, punishable with fine which may extended to 5000 rupees or with imprisonment for two years or with both. In this case I find that the finding possible against the appellant/accused can only be under Section 63 of the Kerala Abkari act, that he was found possessing excess quantity of Indian made foreign liquor, the sale of which is authorized in Kerala under the Kerala State Beverages Corporation.

7. In view of the above finding, the conviction in this case requires alteration. Accordingly, the punishment also will have to be modified. In the particular facts and circumstances, I feel that the maximum fine sentence under Section 63 of the Kerala Abkari Act would be the right and the adequate sentence.

In the result, this appeal is allowed in part. Accordingly, on the finding that the accused/appellant cannot be found guilty under Sections 9 and 55 (a) of the Kerala Abkari Act, and that the offence comes only under

section 63 of the Kerala Abkari Act, the conviction made by the court below under Section 9 of the Kerala Abkari Act will stand reversed, and the conviction under Section 55(a) of the Kerala Abkari Act will stand altered to one under Section 63 of the Kerala Abkari Act. Accordingly, the jail sentence and the fine sentence imposed by the court below under Section 55(a) of the Abkari Act will stand altered and reduced, under Section 386(b)(iii) Cr.P.C, and the accused/appellant is sentenced to pay a fine of Rupees 5,000/- under Section 63 of the Kerala Abkari Act, or in default to undergo simple imprisonment for two months.

sd/-

P.UBAID,
JUDGE

sab