

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

WEDNESDAY, THE 19TH DAY OF AUGUST 2015/28TH SRAVANA, 1937

CRL.A.No. 600 of 2009 ()

AGAINST THE JUDGMENT IN SC 948/2005 of ADDL.SESIONS COURT (ADHOC)-II,
THALASSERY DATED 11-03-2009

APPELLANT(S)/ACCUSED:

KUNJANANDAN, AGED 50 YEARS,
S/O.KUMARAN, KUNDANCHALPARAMBATH HOUSE
KUTHUPARAMBA AMSOM, THRIKKANNAPURAM, THALASSERRY.

BY ADVS.SRI.V.V.ASOKAN
SRI.P.P.RAMACHANDRAN

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA (SHO KUTHUPARAMBA
POLICE STATION) REPRESENTED BY PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR : SMT P MAYA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 19-08-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SUNIL THOMAS, JJ.

Crl.Appeal. No. 600 of 2009

Dated this the 19th day of August, 2015

JUDGMENT

The sole accused who stands convicted in crime No.518/2004 of Kuthuparamba Police Station, for offences punishable under Section 55 (a) of the Abkari Act and Rule 9 of Foreign Liquor Rules is the appellant herein.

2. The prosecution alleged that on 31/8/2004 at about 4.45 p.m., PW1 got secret information about the sale of Indian made foreign liquor (IMFL) by the accused, in contravention of the provisions of the Abkari Act. He reached the spot, intercepted the accused and recovered 16 bottles of IMFL each containing 180 ml.each. After the initial formalities, he was arrested and produced before the Magistrate Court. PW1 completed the investigation and laid the final charge before the Court.

3. The accused faced the trial before the Sessions Court, Thalassery, in SC No.948/2005. The prosecution examined PW1 to PW5 and marked Exts.P1 to P8. MO1 and MO2 were

identified. The court below, on an evaluation of the materials, found the accused guilty, convicted and sentenced him to undergo rigorous imprisonment for one year and to pay a fine of Rupees One Lakh and in default, to undergo rigorous imprisonment for one year more.

4. Aggrieved by the above judgment, conviction and sentence, the accused has preferred this appeal. Heard the learned counsel for the appellant/accused and the learned Public Prosecutor. Examined the records.

5. PW1 is the detecting officer. He deposed that on the relevant day, he got secret information that the accused was in possession of IMFL and standing at a specified location. On reaching there, he was found standing at a lane carrying a black plastic bag. He was searched and 16 bottles of IMFL, each containing 180 m.l. were recovered. One bottle was opened, tested and confirmed that it was IMFL and the accused was arrested at the spot. Currency notes worth Rs.210/- was also recovered from him. One opened bottle and another bottle were taken as samples, sealed and labels bearing

the signatures of the accused, two independent witnesses and that of PW1, were affixed. The seizure mahazar Ext.P1 was prepared. The accused was arrested and thereafter taken to the police station.

6. The above version of PW1 is corroborated by the oral testimony of PW2, who was the ASI of Kuthuparamba police station, who accompanied the detecting officer. The version of PW1 and PW2 are uniform in general particulars. The above version of interception, search, seizure, labeling and other relevant facts tallied with the version meticulously mentioned in Ext.P1, the seizure mahazar, as well as in Ext.P2 and P3, which were the memo of arrest and the inspection memo respectively. The above three documents are the contemporaneous documents. On material points, they corroborate each other.

7. The prosecution relied on the oral testimony of PW3 and PW4, projecting them as independent eye witnesses to the entire incident. However, both the witnesses turned hostile and did not support the

prosecution case in any manner. Both the witnesses admitted their signature, though, according to them, it was signed at a different place and in different circumstances. However, they have no allegation that they were either coerced to execute the above document or that they have affixed their signature on the blank papers. In the absence of any other doubtful circumstance, I am not inclined to disbelieve the version of the prosecution in this regard. Hence, the fact that, they turned hostile and retracted from their version given to the police, will not in any manner weaken the prosecution case to that extent.

8. The defence set up by the accused was that the case was a false one and he has been falsely implicated in the case. However, absolutely no motive is alleged against the investigating officer or the detecting officer. In the absence of any specific motive, there is no reason to presume why the accused should be falsely implicated in a criminal case.

9. It was vehemently contended by the learned counsel for the accused that the detecting officer himself

was the investigating officer. It is true that it would have been ideal, had the investigation been conducted by another officer, at least to ensure that there is transparency. This assumes more significance, since the only witness, who has supported the prosecution case is PW2, who himself is the subordinate of PW1. However, there is nothing on record to show that any prejudice is caused to the accused.

10. The learned counsel for the accused vehemently argued that the prosecution case rests on a factual premise that IMFL allegedly recovered from the accused were illegally imported from Mahe and hence, coming under the vice of section 55(a) of the Act. It was contended by the learned counsel that, the specific allegation was that the liquor was only made for sale in Pondicherry. However, there is absolutely no evidence to show that it was brought from Mahe. PW1 in his evidence also did not specifically mention that the above contraband was brought from Mahe. In Ext.P1 also, apart from some statement regarding the search, seizure and preparation of the document, there

is no allegation of transportation of it from Mahe. The only allegation in Ext.P1 was that the accused was found in the process of sale of IMFL, as distinct from the allegation that it was illegally transported from Mahe. However, in Ext.P2, the only reason stated was that the accused was in illegal possession of IMFL, meant for sale. This being the entries in the contemporaneous documents, in Ext.P4 FIR, which was subsequently made, the allegation is that the accused had brought IMFL illegally which was meant for sale in Pondichery alone. There is absolutely no evidence forthcoming as to how the detecting officer gathered information that it was illegally imported from Mahe. There is nothing on record to show that after the interception, any material was brought out to show that it was illegally imported from Mahe.

11. PW1, in his version also did not speak anything about the import or even make a reference that it was purchased and brought from Mahe. However, the court charge was framed on the basis that IMFL meant for sale in Pondichery was imported for sale. It is pertinent to

note that none of the contemporaneous documents speak of illegal import. The only allegation of illegal import is available in the FIR and the court charge is framed on an allegation, which is not discernible from the available materials.

12. PW1, in his evidence, only stated with reference to the label on the material objects, which indicated that the items were meant for sale in Pondicherry. However, it is pertinent to note that apart from referring to the label, entires of which are available on Ext.P1, PW1 did not refer of illegal import. In other words, the prosecution exclusively relied on the entries on the labels found on the bottles. This Court in **Tippu Mohammed v. State of Kerala and Another** (2015 (1) KHC SN 4) had occasion to deal with an identical situation in which the prosecution exclusively relied on the label alone. The court held that the alleged import of liquor was the basic fact required to be proved to attract the offence. Hence, it was bound to be proved by legally acceptable evidence. The Court held that there may be difficulty in getting documentary

evidence to prove that fact. However, it could be proved by assertion on oath by the prosecution witnesses in the form of oral evidence. Such assertion of the witness can be tested by cross-examination. In such case, the seizure Mahazar will corroborate the parol evidence. It was held that without venturing to prove the elementary facts constituting the offence, the prosecution cannot rely on the mahazar or on the writing on the bottles alone to prove the case of import of IMFL.

13. In the case at hand, there is absolutely no evidence regarding the illegal import as discernible from the version of PW1 or PW2. Hence, the decision is clearly applicable to the facts of this case and the attempt of the prosecution to rely completely on the entries in the labels will not help them. Consequently, the prosecution has failed to prove the illegal import of the IMFL. Hence, now it will have to be considered as to whether the sale as alleged by the prosecution stands proved. Regarding the allegation of sale, PW1 himself has admitted that the accused was not found in the process of sale. No person

has witnessed the alleged sale by the accused. No glass or other implements were also recovered from him at least to indicate that he was in the process of sale of IMFL . Merely because Rs.210/- was recovered from the accused, it cannot be presumed that it was the proceeds of sale. This has to be appreciated in the back ground that the defence of the accused was that it was his daily earning. PW1 did not even depose that it was the money that was received by the sale of the IMFL. He also admitted that none of the witnesses have stated that the accused was found selling IMFL. Hence, the allegation that the accused was selling IMFL cannot be sustained.

14. PW1 in his evidence admitted that at the time of search and seizure, the permissible limit of IMFL was three litres. Only 2.800 litres of IMFL were recovered from the accused. The accused has a specific suggestion that the quantity of IMFL recovered from him was meant for his own use. This is neither controverted nor challenged. Consequently, the materials brought on record do not prove the commission of any offence, by the

accused, as alleged by the prosecution.

15. In the light of the above discussion, the conviction against the accused is not legally sustainable. The accused is entitled for acquittal.

16. In the result, the appeal is allowed. The conviction and sentence imposed by the Court below is set aside and the accused is acquitted. The bail bond executed by him shall stand discharged.

Sd/-

SUNIL THOMAS
Judge

dpk

