

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

TUESDAY, THE 8TH DAY OF DECEMBER 2015/17TH AGRAHAYANA, 1937

CRL.A.No. 1551 of 2004 (C)

SC 83/2003 of ADDL.SESIONS COURT FAST TRAC (ADHOC-II), KOZHIKODE

APPELLANT(S)/ACCUSED:

SIVANANDAN, S/O.NANU,
KUZHITHANAPOYIL HOUSE, MEENATH KARA, PALAYADNADA
VADAKARA.

BY ADV. SMT.K.V.RESHMI

RESPONDENT(S)/COMPLAINANT AND STATE:

1. THE SUB INSPECTOR OF POLICE,
PAYYOLI POLICE STATION, (CRIME NO.85/2001).
2. THE STATE OF KERALA REPRESENTED
BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SMT. SEENA RAMAKRISHNAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 08-12-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SKV

K.RAMAKRISHNAN, J.

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Crl. Appeal No. 1551 OF 2004

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Dated this the 8th day of December, 2015

JUDGMENT

The Accused in SC No.83/2003 on the file of the Additional Sessions Court (Fast Track-II), Kozhikode is the appellant herein. The appellant was charge sheeted by the Sub Inspector of Police, Payyoli Police Station in Crime No.85/2001 of that Police Station under Section 55(a) of the Abkari Act and rule 9 of the Foreign Liquor Rules.

2. The case of the prosecution in nutshell was that on 10.4.2001 at about 18.30 hours, the accused was found found to be in possession of 12 bottles of 750 ml each Indian made foreign liquor without any valid documents and found transitting the same along the road by the side of Soda Shop bearing No.XIII/1352 of Payyoli Panchayat owned by Kannankandy Abdurahiman, situated on the western side of Kozhikode-Kannur National Highway in Melady amsom desom in violation of the provisions of the Abkari Act and

thereby he had committed the above said offence.

3. After investigation, final report was filed before the Judicial First Class Magistrate's Court, Payyoli, where it was taken on file as CP 40/2002. After complying with the formalities, the learned Magistrate committed the case to Sessions Court, Kozhikode under Section 209 of the Code of Criminal Procedure (hereinafter referred to as the Code). After committal, the Sessions Judge took cognizance of the case as SC 83/2003 and it was originally made over to Assistant Sessions Court, Quilandy for disposal. Thereafter it was withdrawn and made over to Additional Sessions Court, (Adhoc-II) Kozhikode by the Sessions Judge.

4. When the accused appeared before the court below, after hearing both sides charge under Section 55(a) of the Abkari Act and Rule 9 of the Foreign Liquor Rules was framed and same was read over and explained to him and he pleaded not guilty. In order to prove the case of the prosecution, PWs1 to 4 were examined and Exts.P1 to P9 MO1 series and MO2 were marked on the side of the prosecution. After closure of the prosecution evidence, the

accused was questioned under Section 313 of the Code and he denied all the incriminating circumstances brought against him in the prosecution evidence and he had further stated that he had not committed any offence and no articles were seized from his possession and he has been taken by the police from his house and he has been falsely implicated in the case. Since the evidence in this case did not warrant an acquittal under Section 232 of the Code, the accused was called upon to enter on his defence, but no defence evidence was adduced on the side. After considering the evidence on record, the court below found the appellant guilty under Section 55(a) of the Abkari Act and Rule 9 of Foreign Liquor Rules and convicted him thereunder and sentenced him to undergo rigorous imprisonment for two years and also to pay a fine of Rs.1,00,000/- in default to undergo simple imprisonment for six months under Section 55(a) of the Abkari Act and no separate sentence was awarded under Rule 9 of Foreign Liquor Rules. Set off was allowed for the period of detention already undergone by him under Section 428 of

the Code. Aggrieved by the same, the above appeal has been preferred by the appellant/accused before the court below.

5. Heard Smt. Rashmi K.V., counsel appearing for the appellant and Smt. Seena Ramakrishnan learned Public Prosecutor appearing for the State.

6. Counsel for the appellant submitted that there is no evidence to show that it is an illicit liquor so as to attract the offence under Section 55(a) of the Abkari Act. Further independent witnesses to seizure did not support the case of the prosecution. Court below had relied on the evidence of official witnesses alone which is unsustainable in law. The evidence of PWs1 and 2 is not sufficient to prove the seizure. So according to the learned counsel, the prosecution has not proved the case beyond reasonable doubt and if at all this court found that he has found to be in possession of foreign liquor, no offence under Section 55 (a) is attracted, only offence under Section 63 is attracted. She had also submitted that considering the nature of contraband articles seized, the sentence imposed is harsh.

7. On the other hand, learned Public Prosecutor submitted that the evidence of PW1 will go to show that there was no sticker of the Kerala State Beverages Corporation found in the bottles and in some of the bottles it was noted that it was intended to be sold at Pondicherry. So it cannot be said to be licit liquor and he was found transitting the same. It can be treated as imported from Mahe of Pondicherry State through to the State of Kerala. So the 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 10.4.2001, at about 6.30 pm, while PW1 Assistant Sub Inspector of Police was attached to Payyoli Police Station was doing patrol duty along with PW2, Police Constable and others and when they reached the place of occurrence, they saw the accused coming with MO2 big shopper bag. Getting suspicion about his conduct, stopped him and on examination of the big shopper bag, it was found that it contained 12 bottles of 750 ml each Indian made foreign

liquor. He was not having any documents in his possession and in some of the bottles it was found that it was intended to be sold at Pondicherry and the sticker of the Kerala State Beverages Corporation was not seen in any of the bottles. So he arrested the accused and prepared Ext.P2 arrest memo. He took one bottle as sample from each brand as all the bottles are having identical label and he was satisfied that it was Indian made foreign liquor. He sealed the sample bottles and labelled the same by obtaining the signatures of himself, witnesses and accused. He sealed the other bottles also and seized the bottles as per Ext.P1 mahazar in the presence of PW4 and another. He conducted body search of the accused and prepared Ext.P3 inspection memo. Thereafter, he came to Police Station along with the accused and produced him before PW3, the Sub Inspector of Police who registered Ext.P4 First Information Report against the accused as Crime No.85/2001 of Payyoli Police Station under Section 55(a) of the Abkari Act and Rule 9 of the Foreign Liquor Rules. He produced the accused along with Ext.P5 remand report before the court and he was

remanded to custody. Thereafter he prepared Ext.P6 property list and produced the articles before court. He sent Ext.P7 forwarding note with a request to send the sample for analysis and samples were sent from court and Ext.P8 chemical analysis report obtained, which shows that sample bottles contained ethyl alcohol. He went to the place of occurrence and prepared Ext.P9 scene mahazar in the presence of witnesses. He questioned the witnesses and recorded their statements. He collected Ext.P8 chemical analysis report and completed investigation and submitted final report.

9. PW4 is the independent witness to seizure. Though he admitted his signature in Ext.P1, he denied having seen the arrest or seizure of any article from the possession of the accused. He had further stated that he knew the accused. So it is clear from this that he was trying to help the accused and that was the reason why he was not supporting the case of the prosecution.

10. Then the evidence available to prove the arrest and seizure is that of PW1 the detecting officer and PW2 the

police officer who accompanied him. PW1 had categorically stated that he was working as Additional Sub Inspector of Police and he was doing vehicle checking duty ,on that day along with PW2 and others and at that time, the accused came carrying MO2 big shopper bag and he tried to go away from the place and so he stopped him. On examination of the MO2 bag, it contained 12 bottles of 750 ml each Indian made foreign liquor and 6 bottles contained label showing that it was intended to be sold at Pondicherry and no such label was seen in other bottles and there was no sticker of the Kerala State Beverages Corporation found in any of the bottles. Accused was also not having any documents in his possession to keep possession of the articles as well. So he arrested him. He took one bottle each from the two categories of Indian made foreign liquor found in the bag and then sealed the bottles and seized the same as per Ext.P1 mahazar. Thereafter he came to Police Station and entrusted the accused along with contraband articles and documents prepared to PW3 who registered the crime and conducted investigation.

11. The evidence of PW1 on this aspect was corroborated by the evidence of PW2, Police Constable accompanied on that day. Though they were cross examined at length, nothing was brought out to discredit their evidence on this aspect. The only suggestion given to them was that the articles seized in an abandoned state were used and he has been falsely implicated in the case. Except the suggestion given, there is no other evidence adduced on the side of the accused to prove false implication. So court below was perfectly justified in relying on the evidence of official witnesses and coming to the conclusion that the accused was arrested along with 12 bottles of 750 ml each said to be contained Indian made foreign liquor.

12. It is seen from the evidence of PW3 that he registered the crime and produced the article before the court without delay which is seen from Ext.P6 property list that the articles were produced before court on 11.4.2001 and Ext.P7 forwarding note shows that it contained specimen seal impression of the seal used for sealing the

article. Ext.P8 chemical analysis report shows that the specimen seal tallied with the seal seen on the bottles and the sample contained 42.89% and 42.94% by volume of ethyl alcohol. There is no case for the accused that it was not foreign liquor. Further he was not having any documents with him and the label seen on some of the bottles showed that it was intended to be sold at Pondicherry. It was not having the sticker of the Kerala State Beverages Corporation as well. So it cannot be said that it is illicit liquor. So the submission made by the counsel for the appellant that it will fall under Section 63 of the Abkari Act cannot stand. So court below was perfectly justified in convicting the appellant for the offence under Section 55(a) of the Abkari Act and Rule 9 of the Foreign Liquor Rules and that finding does not call for any interference.

12. As regards sentence is concerned, the court below had sentenced him to undergo rigorous imprisonment for two years and also to pay fine of Rs.1,00,000/- and in default to undergo simple

imprisonment for six months. It is seen from the judgment itself that he was aged 61 years even at the time when offence was committed. Further articles seized was foreign liquor. Though it is harmful for consumption, it cannot be treated at par with arrack which was totally prohibited. So considering the circumstances, this court feels that the sentence imposed appears to be harsh. Since minimum sentence of Rs.1,00,00/- provided under the statute as fine, it cannot be reduced. But at the same time, some leniency can be shown as regarding the substantive sentence and default sentence imposed. So the substantive sentence of two years rigorous imprisonment and default sentence of six months simple imprisonment under Section 55(a) of the Abkari Act is set aside and the same is modified as follows:

The appellant is sentenced to undergo simple imprisonment for one month and also to pay a fine of Rs.1,00,000/- in default to undergo simple imprisonment for 15 days. Set off was allowed for the period of detention already undergone.

So the appeal is allowed in part and the order of

conviction passed by the court below against the appellant under Section 55(a) of Abkari Act and Rule 9 of the Foreign Liquor Rules and sentence of fine of Rs.1,00,000/- imposed under Section 55(a) of the Abkari Act are hereby confirmed. But substantive sentence of two years rigorous imprisonment and default sentence of six months simple imprisonment are set aside and the same is modified as follows:-

The appellant is sentenced to undergo simple imprisonment for one month and also to pay a fine of Rs.1,00,000/- in default to undergo simple imprisonment for 15 days. Set off was allowed for the period of detention already undergone.

Office is directed to communicate this order to the concerned court immediately.

Sd/-
K.RAMAKRISHNAN, JUDGE

SKV