IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

THURSDAY, THE 1ST DAY OF OCTOBER 2015/9TH ASWINA, 1937

CRL.A.No. 1259 of 2005 ( )
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AGAINST THE JUDGMENT IN SC 953/2004 of ADDL.SESSIONS JUDGE(ADHOC)-IV, TRIVANDRUM, DATED 19-07-2005.

APPELLANT(S)/ACCUSED:
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AYYAPPAN NAIR, S/O.RAMAN PILLAI,
SANTHI, T.C.50/1012, THALAYIL DESOM,
MANACAUD VILLAGE, THIRUVANANTHAPURAM.

BY ADV. SRI.G.SUDHEER KARAKKONAM

RESPONDENT(S)/COMPLAINANT:
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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 01-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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**K. RAMAKRISHNAN, J.**

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Crl. Appeal No.1259 of 2005

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Dated this the 1st day of October, 2015

**JUDGMENT**

Accused in S.C.No.953/2004 on the file of the Additional Sessions Court Fast Track (Adhoc)-IV, Thiruvananthapuram, is the appellant herein. The appellant was charge-sheeted by the Excise Inspector, Thiruvananthapuram Excise Range in Crime No.103/1999 of that range under Section 55(a) of Abkari Act.

2. The case of the prosecution in nut shell was that, on 14.10.1999 at about 12.30 p.m., the accused was found to be in possession of 6 liters of Indian Made Foreign Liquor in 8 bottles of 750 m.l. each, found transitting the same in his scooter bearing Reg. No.KL-01-B/1565, in front of Royal Community Hall, Idapazhanji, Pangode Ward, Thirumala Village, 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-II, Thiruvananthapuram, and the case was taken on file as C.P.No.94/2003. Thereafter it was committed to the Sessions Court, Thiruvananthapuram by the learned magistrate under Section 209 of the Code of Criminal Procedure. After committal, the Sessions Court, Thiruvananthapuram had taken cognizance of the case as S.C.No.953/2004 and it was made over to the Additional Sessions Court, Fast Track (Adhoc)-IV, Thiruvananthapuram, for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under Section 55(a) of the 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 5 were

examined and Exts.P1 to P5 and MO1 series 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, he had not committed any offence and he is an Ex-Service man, he along with 12 persons were standing near the Military Canteen, at that time the police people came and took them 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, but no defence evidence was adduced on his side. After considering the evidence on record, the court below found the appellant guilty under Section 55(a) of the Abkari Act and convicted him there under and sentenced him to undergo rigorous imprisonment for three years and also to pay a fine of ₹1,00,000/-, in default to undergo simple imprisonment for six months. 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.G.Sudheer (Karakkonam)), Advocate appearing for the appellant and Smt. Seena Ramakrishnan learned Public Prosecutor appearing for the State.

6. The counsel for the appellant submitted that the appellant is an Ex-Service man and the articles seized was Indian Made Foreign Liquor, sold from Military Canteen, intended to be supplied to the Ex-Service man. Even assuming that the entire allegation of the prosecution is accepted, it will not fall under Section 55(a) of the Abkari Act, but it may fall under Section 63 of the Abkari Act for

possession of excess quantity of licit liquor, especially when there is no evidence to show that he was engaged in sale. He had also argued that the court below was not justified in convicting the appellant for the offence alleged.

7. On the other hand, learned Public Prosecutor submitted that, court below had considered all the aspects in the right perspective and correctly convicted the accused for the said offence.

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

On 14.10.1999 at about 12.30 p.m., while PW1 along with PW2 and others were doing patrol duty and when they reached the place of occurrence, they saw the accused person coming in his scooter. Then they stopped him and on examination of the scooter, they found that in the box of the scooter, there were 8 bottles of Indian Made Foreign Liquor of 750 ml., each and he was not having any document in his possession and it was intended to be sold to defence persons alone. So they arrested the accused and prepared Ext.P2 arrest memo. Thereafter he had taken one bottle and examined the same by tasting and smelling and he was convinced that it was Indian Made Foreign Liquor. He took that bottle as a sample and sealed the same and sealed other bottles and seized the same as per Ext.P1 mahazar in the presence of PW3 and another. Thereafter he came to the excise office and produced the accused and the contraband article seized before PW4, the Excise Inspector, Thiruvananthapuram Excise Range, who registered Ext.P3 occurrence report as Crime No.103/1999 of that Excise Range against the accused under Section 55 (a) of the Abkari Act. He had also prepared Ext.P4 property list and produced the accused along with remand report and the articles seized before Court. He had also sent a request to send the bottle for chemical analysis and Ext.P5 chemical analysis report obtained, which shows that the sample contained ethyl alcohol. Investigation in this case was conducted by PW5, he questioned the witnesses, collected the chemical analysis report and submitted final report.

9. PW3 is the independent witness to the seizure. Though he admitted the signature in the seizure mahazar (Ext.P1), he did not support the case of the prosecution regarding seizure of any article from the possession of the accused and arrest of the accused. So it is clear from his conduct that he is now trying to help the accused and that was the reason why he is not supporting the case of the prosecution. Then the evidence is only that of PWs 1 and 2, the detecting officer and the Excise Guard who accompanied the detecting officer. PW1 had categorically stated that while he was doing patrol duty, on that day and when they reached the place of occurrence,

they saw the accused coming in his scooter and on verification of the scooter it was found that it contained 8 bottles of Indian Made Foreign liquor of 750 ml each and the accused was not having any documents in his possession. So he arrested him, seized the bottles as per Ext.P1 mahazar and produced him before the Excise Inspector having jurisdiction to register the crime. The evidence of PW1 was corroborated by the evidence of PW2. Further the fact that, the accused was arrested by the Excise Officials on that day near the Military Canteen is not in dispute. So considering the circumstances, there is nothing to disbelieve the evidence of PWs 1 and 2 to come to the conclusion that 8 bottles of Indian Made Foreign Liquor intended to be sold for defence service persons only were seized from the possession of the accused and it was produced before the court in time without further delay and the chemical analysis report shows that it contained ethyl alcohol.

10. In order to attract the offence under Section 55(a) of Abkari Act, it must be proved by the prosecution that it was intended for export, import etc., as provided under that section. Mere possession of Indian Made Foreign Liquor alone will not be sufficient to attract the offence under Section 55(a) of Abkari Act. Further the prosecution has no case that it is illicit liquor. Further the fact that, the accused is an Ex-Service man was not seriously disputed as well, as the investigating officer has stated that he did not make any enquiry regarding the same. So once it is proved that the accused is an Ex-Service man and he is entitled to possess liquor which was supplied to him from their canteen, then keeping excess quantity of that alone will not make the same as an offence under Section 55(a) of Abkari Act, but it may at the most fall under Section 63 of the Act. This was so held in the decision reported in **Mohanan v.**

**State of Kerala (2007(1) KLT 845)** and **Nobbey v. State of Kerala (2011(1) KLT (SN) 51 Case No.68)**. So it is clear from the decisions that, keeping of excess quantity of Indian Made Foreign Liquor which was obtained by the accused from a lawful force will not come under Section 55 (a) of Abkari Act, but only under Section 63 of Abkari Act. So the finding of the Court below that the accused had committed the offence punishable under Section 55(a) of Abkari Act is unsustainable in law and the same is liable to be set aside and he is liable to be convicted for the offence under Section 63 of the Abkari Act and this court accordingly convict him under that section.

11. In view of the fact that the accused was found guilty only under Section 63 of the Abkari Act, the sentence imposed under Section 55(a) of Abkari Act is not proper and the same is also set aside. Considering the quantity involved this court feels that, imposing a fine of

₹4,000/- will be sufficient and that will meet the ends of justice. So the appellant is sentenced to pay a fine of ₹4,000/-, in default to undergo simple imprisonment for one month.

In the result, the appeal is allowed in part. The order of conviction and sentence passed by the court below against the appellant under Section 55(a) of Abkari Act are hereby set aside and he is acquitted of that charge, but he is found guilty under Section 63 of Abkari Act and convicted there under and sentenced to pay a fine of ₹4,000/-, in default to undergo simple imprisonment for one month. If any amount has already been deposited, that can be given credit to this amount. If any excess amount have been deposited, then court below is directed to refund the excess amount to the appellant on making necessary application for this purpose.

With the above modification of the commission of offence and the sentence, the appeal is allowed in part and disposed of and accordingly.

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

Sd/-
**K. Ramakrishnan, Judge**

***//True Copy//***

***P.A. to Judge***

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