IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 26TH DAY OF OCTOBER 2015/4TH KARTHIKA, 1937

CRL.A.No. 1418 of 2005 ( )

SC 365/2003 OF ADDL.DISTRICT COURT (FAST TRACK--II) ALAPPUZHA

APPELLANT(S)/ACCUSED:

RADHAKRISHNA KURUP
MANATHARAYIL VEEDU, NJAKKANAL MURI
KRISHNAPURAM VILLAGE, KARTHIKAPPALLY.

BY ADVS.SRI.R.GOPAN
SRI.BASANT BALAJI
ADV.ANEETHA.A.G(LEGAL AID COUNSEL)
ADV.ANEETHA.A.G(LEGAL AID COUNSEL)

RESPONDENT(S):

STATE OF KERALA
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

R1 BY PUBLIC PROSECUTOR SMT.SEENA RAMAKRISHNAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 26-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SKV

K.RAMAKRISHNAN, J.

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Crl. Appeal No.1418 OF 2005

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Dated this the 26th day of October, 2015

JUDGMENT

Accused in SC No.365/2003 on the file of Additional Sessions Judge (Fast Track-II) Alappuzha is the appellant herein. The appellant was charge sheeted by the Excise Inspector Kayamkulam Excise Range for the offence punishable under Section 55(a) of the Abkari Act in Crime No.12/2001 of that Excise Range.

2. The case of the prosecution in nutshell was that on 7.6.2001, at about 1.30 p.m., the accused was found to be in possession of 5.760 litres of Indian made foreign liquor in 32 bottles having capacity of 180 ml. each in a big shopper bag and found transitting the same along the road in front of Cosmo Hotel near K.S.R.T.C. Bus Stand at Kayamkulam in violation of the provisions of the Abkari Act and thereby he had committed the offence punishable under Section 55(a) of the Abkari Act.

3. After investigation, final report was filed before

the Judicial First Class Magistrate Court Kayamkulam where it was taken on file as CP No.21/2003. The learned Magistrate, after complying with the formalities, committed the case to the Sessions Court, Alappuzha under Section 209 of the Code of Criminal Procedure (hereinafter referred to as the Code). After committal, the learned Sessions Judge took cognizance of the case as SC No.365/2003 under Section 55(a) of the Abkari Act and originally made over to Additional Assistant Sessions Court, Alappuzha for disposal. Thereafter it was withdrawn by the Sessions Judge and made over to Additional Sessions Court (Adhoc-II) Alappuzha for disposal.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 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 P6 and MO1 series and MO2 were marked on their side. 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. He had further stated that he was a leader of the Hindava Organisation of Kayamkulam Mandalam and one Excise guard Radhakrishnan had got some enmity in connection with the temple festival. On account of that enmity, at his instance, he was taken from his house at 2.30 pm on 7.6.2001 and brought to the Excise Office, Kayamkulam and 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 by the Additional Sessions Judge, 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 thereunder and sentenced him to undergo rigorous imprisonment for one year and also to pay fine of Rs.1,00,000/- and in default to undergo rigorous imprisonment for three months more.

Set off was allowed for the period of detention already undergone by him under Section 428 of the Code. Aggrieved by the same, the present appeal has been preferred by the appellant/accused before the court below.

5. Inspite of opportunity given, since there was no representation for the appellant, even when it was posted in the disposal list Smt. Anitha A.G., Advocate Ernakulam was appointed as legal aid counsel.

6. Heard the legal aid counsel Smt. Anitha and Smt. Seena Ramakrishnan, learned Public Prosecutor appearing for the State.

7. The legal aid counsel appearing for the appellant submitted that there was delay in completing the investigation. Further even as per the mahazar, it is seen that it was having the sticker of Kerala State Beverages Corporation and it cannot be said to be an illicit liquor, so as to attract the offence under Section 55 (a) of the Abkari Act. Mere possession of Indian made foreign liquor will not amount to offence under Section 55

(a) of the Abkari Act. At the most it may be an offence for possession of excess quantity of Indian made foreign liquor which may fall under Section 63 of the Abkri Act. The learned Counsel has relied on the decision reported in **Sabu v State of Kerala** [2007 (4) KLT 169] and also **Sabu v State of Kerala** [2003 (2) KLT 173] in support of her case.

8. On the other hand the learned Public Prosecutor submitted that the case of the accused was one of the false implications which has not been established. Further mere delay in submitting the final report alone is not a ground for acquittal and he was found transporting the liquor without any doubt and once possession is proved, then presumption under Section 64 of the Abkari Act will be attracted. So court below was perfectly justified in convicting the appellant for the offence under Section 55(a) of the Abkri Act.

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

On 7.6.2001, at about 1.30 pm, while PW1 the

Excise Inspector of Kayamkulam Excise Range along with PW2 Excise guard and others were doing patrol duty and when they reached near Cosmos Hospital, they saw the accused coming with MO2 big shopper in his hand and on seeing the Excise party, he tried to go away from that place. So he stopped him and on examination of the bag, it was revealed that it contained 32 bottles of Indian made foreign liquor of 180 ml. capacity and it was having the sticker of Kerala State Beverages Corporation and all the bottles were sealed as well. So he opened one of the bottles and examined the contents of the same and satisfied that it was Indian made foreign liquor. When he questioned the accused, he told that he purchased the same from the Kerala State Beverages Corporation out let. He took 150 ml liquid from one of the 180 ml bottle opened in another 180 ml bottle as sample and sealed the same and affixed labels containing the signatures of PWs3 and 4 and affixed the seal and label on all bottles in the similar fashion and seized the bottles and MO2 big shopper bag after describing the same in Ext.P1 mahazar in the presence of PWs3 and 4. Thereafter he arrested the accused evidenced by Ext.P2 arrested memo and gave arrest intimation to his father who came there.

10. He came to Excise office along with the accused and the contraband articles seized and registered Ext.P3 crime and occurrence report as Crime No.21/2001 of Kayamkulam Excise Range against the accused under Section 55(a) of the Abkari Act. He produced the accused before the court along with remand report and he prepared Ext.P4 thondi list and produced the contraband articles seized before the court on the same day along with forwarding note with a request to send the sample for analysis and the sample was sent from court to chemical examiners' laboratory and Ext.P6 chemical examiners' report obtained, which shows that the sample contained 41.15% by volume of ethyl alcohol. The investigation in this case was conducted by CW5 who was no more. He questioned the witnesses and recorded the statement. Further investigation in this case was conducted by PW5 the successor of CW5. He verified the

investigation and completed the investigation and submitted final report before the court.

11. PWs3 and 4 were the independent witnesses to the seizure. PW3 had denied having seen the arrest or seizure and even denied his signature in Ext.P1 mahazar. But he had admitted that he is the neighbour of the accused. PW4, though admitted his signature in Ext.P1 mahazar, had denied having seen the seizure and arrest of the accused. He had also admitted that he is known to accused. So it is clear from their conduct that they were trying to help the accused and that was the reason why they were not supporting the case of the prosecution.

12. Then the evidence available is that of the official witness ie, PW1 the Excise Inspector who detected the crime and PW2 the Excise guard who accompanied him and witnessed the entire seizure and seizure mahazar was prepared in his handwriting. PW1 had categorically stated that while they were doing patrol duty, they saw the accused coming with MO2 big shopper bag in his hand through the road in front of Cosmos Hospital and on

seeing the excise party, he tried to go away from the place. So he stopped him and on verification of MO2 big shopper bag, which was held by him, it was revealed that it contained MO1 series bottles of 180 ml each containing label of Eagle XXX Rum and all the bottles were sealed and having the sticker of Kerala State Beverages Corporation. He had also deposed that when he questioned the accused, he told that they were purchased from the Beverages Corporation out let. But he was not having any document with him at that time. He had also deposed that he opened one of the bottles and examined the contents and satisfied that it was Indian made foreign liquor and thereafter he took 150 ml. liquid from that bottle in a 180 ml bottle as sample and sealed the same and affixed label containing the signatures of himself and the accused and the witnesses. He had also sealed the other remaining 31 bottles and affixed the label in the same manner. Thereafter he arrested the accused and prepared Ext.P2 arrest memo and gave Ext.P5 arrest intimation to his father who came there at that time. He seized the articles as per Ext.P1 mahazar. Thereafter he came to office and registered the crime and produced the accused before court along with the remand report. He prepared Ext.P4 thondi list and produced the articles before the court along with the forwarding note with a requisition to send the sample for analysis. The evidence of PW1 was corroborated by the evidence of PW2, the excise guard who accompanied him. Though they were cross examined at length nothing was brought out to discredit their evidence on this aspect.

13. It is true that there were some discrepancy regarding the place from where the mahazar was prepared. But that alone is not sufficient to disbelieve the case of the prosecution. Further in the decision reported in **Sabu v State of Kerala** [2007 (4) KLT 169], this court has held that there is no legal bar in proving the prosecution case on the basis of the evidence of the official witnesses or investigating officer if their evidence is otherwise free from doubt or infirmity. In this case, nothing brought out to discredit the evidence of PWs1 and

2 regarding this aspect. Further except the suggestion given that the case was registered at the instigation of one Radhakrishnan, Excise guard who was said to be in enimical terms with him, there was no evidence adduced on the side of the accused to prove false implication. So under the circumstances, court below was perfectly justified in coming to the conclusion that prosecution has proved beyond reasonable doubt that 32 bottles of 180 ml capacity of Indian made foreign liquor was seized from the possession of the accused.

14. It is seen from the evidence of PW1 and also Exts.P1, P2 and P4 that the articles reached the court on the same day without delay. Further Ext.P6 chemical analysis report shows that the sample contained 41.15 % by volume of ethyl alcohol and it is having a smell of foreign liquor. So it is clear from this that the prosecution has proved that the the accused was found to be in possession of foreign liquor in excess quantity.

15. In the decision reported in **Sabu v State of Kerala** [2003 (2) KLT 173], this court has held that

unless the prosecution proves that the accused was transporting illicit liquor or they have illegally imported the liquor or the liquor was adulterated or they have manufactured the liquor or the liquor was transported for illegal second sale, it cannot be said that the offence under Section 55(a) of the Abkri Act is attracted. At the most, it may amount to possession of excess quantity of liquor permissible under law though purchased legally from the Kerala State Beverages Corporation and it may fall under Section 63 of the Abkari Act. The same view has been reiterated in the decision reported in **Sabu v State of Kerala** [2007 (4) KLT 169] as well. The same view has been reiterated and affirmed by the Division Bench of this Court in **Mohanan v State of Kerala** [2007 (1) KLT 845].

16. There is no evidence adduced on the side of the prosecution that it was an illegally imported Indian made foreign liquor. It is seen from the evidence that it was having the sticker of Kerala State Beverages Corporation and the accused had stated that it was purchased from

the depot of Kerala State Beverages Corporation. So under the circumstances, it cannot be said that it was an illegally imported foreign liquor or it is an illicit foreign liquor. So under the circumstances and also in view of the dictum laid down in the above decisions, the finding of the court that the accused had committed the offence punishable under Section 55(a) of the Abkari Act is unsustainable in law and the same is liable to be set aside and the accused can only be convicted for the offence under Section 63 of the Abkari Act. So the order of conviction passed by the court below under Section 55(a) of the Abkari Act is set aside and he is acquitted of that charge. But he was found guilty for the offence under Section 63 of the Abkari Act and he is convicted thereunder.

17. In view of the finding that the accused had not committed the offence punishable under Section 55(a) of the Abkari Act, sentence imposed for that offence is also not proper and the same is also set aside. Since this court has found that he is found guilty under Section 63

of the Abkari Act which is punishable with fine alone, this court feels that imposing a fine of Rs.3,000/- with default sentence of one month and that will meet the ends of justice. So the sentence is modified as follows:

Appellant is sentenced to pay fine of Rs.3,000/- and in default to undergo simple imprisonment for one month more.

In the result appeal is allowed in part. The order of conviction and sentence passed by the court below against the appellant under Section 55 (a) of the Abkari Act is set aside and he is acquitted under that charge. But he is found guilty under Section 63 of the Abkari Act and he is convicted thereunder and sentenced to pay a fine of Rs.3,000/- and in default to undergo simple imprisonment for one month. If any excess fine amount has been remitted by him court below is directed to refund the excess amount to him on making necessary application to that purpose.

I place appreciation on record for the manner in which the legal aid counsel Smt. Anitha has argued the case for the appellant.

Office is directed to communicate this judgment to the court immediately.

K.RAMAKRISHNAN, JUDGE

SKV